92-441

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,
Petitioners,

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 1, 1992

QUESTIONS PRESENTED

1. Was the District Court barred by the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), from entering a final judgment of dismissal with prejudice on the merits pursuant to Rules 8(a), 8(e) and 41(b), Federal Rules of Civil Procedure of Title 28, United States Code, in the absence of its finding that the related ongoing state criminal proceedings had been undertaken in bad faith, to harass the Petitioners, or for other exceptional circumstances (i) when the Respondents had raised *Younger* as a bar to the District Court's exercise of jurisdiction and (ii) when the equitable claims and issues raised in the federal civil rights proceedings below are the same equitable claims and issues raised in the related ongoing state criminal proceedings? If so, is the District Court's action void for want of jurisdiction?

2. Was the District Court barred by the doctrines of *Younger* and *Deakins v. Monaghan*, 484 U.S. 193 (1988), from entering a judgment of dismissal with prejudice on the merits as to Petitioners' money damage claims, pursuant to 8(a), 8(e) and 41(b), Federal Rules of Civil Procedure of Title 28, United States Code, in the absence of its finding that the related ongoing state criminal proceedings had been undertaken in bad faith, to harass the Petitioners, or for other exceptional circumstances?

3. Did the District Court abuse its discretion by dismissing Petitioners' First Amended Complaint with prejudice pursuant to Rules 8(a), 8(e) and 41(b), Federal Rules of Civil Procedure of Title 28, United States Code?

4. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion when it determined that Petitioners' appeal to that court was frivolous and sanctioned Petitioners with double costs and awarded attorney's fees to some of the Respondents?

LIST OF PARTIES

The parties to the proceedings below and to this Petition were and are the petitioners David Randall Jenkins, Stacia Lee Sumwalt and The JNC Companies, an Arizona corporation, and the respondents Alan D. Davidon, individually and in his official capacity as Deputy Pima County Attorney; Millard Rowlette, individually and in his official capacity as Deputy Pima County Attorney; Stephen D. Neely, in his official capacity as Pima County Attorney; Jerry Goddard, individually; Pima County, Arizona, a body politic and corporate; Greg Lunn, in his official capacity as Pima County Supervisor for District 1; Dan Eckstrom, in his official capacity as Pima County Supervisor for District 2; Ed Moore, in his official capacity as Pima County Supervisor for District 3; Reg Morrison, in his official capacity as Pima County Supervisor for District 4; Raul Grijalva, in his official capacity as Pima County Supervisor for District 5; Lawrence Fleischman, individually and in his official capacity as judge of the Pima County Superior Court, Division 19; Bernardo P. Velasco, in his official capacity as judge of the Pima County Superior Court, Division 11; Fred T. Boice, individually and in his official capacity as trustee in bankruptcy; Peter David Beren, individually; Susan G. Boswell, individually; and Streich Lang, P.A., a professional law association.

Pursuant to Rule 29.1, of the Rules of the Supreme Court of the United States of Title 28, United States Code, Petitioners disclose the following list of wholly owned subsidiaries of The JNC Companies, an Arizona corporation:

JNC Realty Corporation
JNC Construction Resources Corporation
JNC Financing Consultants, Inc.
JNC Business Planning Corporation
JNC Development Corporation
JNC Information Systems, Inc.
Ventana Financial Corporation
JNC Agencies, Inc.
Rillito Concessions, Inc.
Rillito Operations, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners David Randall Jenkins ("Jenkins"), Stacia Lee Sumwalt ("Sumwalt") and The JNC Companies ("JNC"), an Arizona corporation, respectfully request that a writ of certiorari issue to review the memorandum decision and the orders denying rehearing *en banc* and awarding attorney's fees against the Petitioners entered by the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding on March 2, 1992, April 27, 1992 and June 12, 1992.

DECISIONS AND ORDERS BELOW

The March 2, 1992 Memorandum Decision of the United States Court of Appeals for the Ninth Circuit is not a reported

decision. A copy of this Memorandum Decision can be found in Exhibit A of the Appendix at p. A-1, *infra*. The April 27, 1992 Order of the Ninth Circuit, denying Petitioners' Petition for Rehearing En Banc, is not a reported decision. A copy of this Order can be found in Exhibit A of the Appendix at p. A-7, *infra*. The June 12, 1992 Ninth Circuit Order awarding attorney's fees against the Petitioners is not a reported decision. A copy of the Ninth Circuit's June 12, 1992 Order awarding attorney's fees on appeal against the Petitioners can be found in Exhibit A of the Appendix at p. A-8, *infra*.

The District Court's February 25, 1991 Judgment of Dismissal With Prejudice, which dismissed Petitioners' first amended complaint with prejudice pursuant to Rules 8(a), 8(e) and 41(b), Federal Rules of Civil Procedure, Title 28, United States Code, is not a reported decision. A copy of the District Court's February 25, 1991 Judgment of Dismissal With Prejudice and Opinion and Order can be found respectively in Exhibit A of the Appendix at pp.A-15 and A-16, *infra*. The District Court's February 7, 1992 Order is not a reported decision. A copy of the District Court's February 7, 1991 Order can be found in Exhibit A of the Appendix at p. A-11, *infra*.

JURISDICTION

The Petitioners filed their original complaint in the United States District Court for the District of Arizona, Tucson Division (the "District Court"), on May 23, 1990 seeking (i) federal injunctive and declaratory relief regarding two ongoing state criminal proceedings alleged to have been undertaken in bad faith without a reasonable expectation of obtaining valid convictions (ii) money and racketeering damages, and (iii) attorney's fees and costs from defendant prosecutors, state court judges, the body politic of Pima County, Arizona and others. Upon its finding that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners, or for other exceptional circumstances, the District Court would have had jurisdiction to intervene in the state criminal proceedings pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1334(3). Further, the District Court had jurisdiction over the Petitioners' federal racketeering claims pursuant to 18 U.S.C. §1964(c).

The Petitioners filed their First Amended Complaint ("FAC") on December 21, 1990. The District Court's February 7, 1991 Order asserted that Rules 8(a), 8(e) and 41(b) governed its decision to dismiss Petitioners' FAC with prejudice for the reason that the complaint was too lengthy and the exhibits were too voluminous. Further, the District Court indicated that by dismissing Petitioners' FAC with prejudice pursuant to Rule 41(b), such dismissal operated as an adjudication upon the merits. The District Court's February 7, 1991 Order did grant the Petitioners leave to file a further amended complaint within ten (10) days, limited to fifteen (15) pages.

On February 22, 1991, Petitioners filed a motion for reconsideration for the reasons that the District Court failed to weigh the heavy pleading burden various courts have historically imposed on plaintiffs seeking (i) relief under 42 U.S.C. §1983, (ii) relief under the federal racketeering statute, (iii) federal court intervention in parallel state criminal proceedings, and (iv) money damages against defendants raising absolute and qualified immunity defenses. The District Court, on February 25, 1991, denied Petitioners' motion for reconsideration and motion for a stay in the state criminal proceedings, which was requested pursuant to Petitioners' previously filed motion for injunctive relief. Thereupon, the District Court entered its final judgment dismissing Petitioners' FAC with prejudice.

On February 26, 1991, Petitioners filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had jurisdiction to determine the merits of the appeal pursuant to 28 U.S.C. §1291.

In their responsive brief, some of the Respondents moved the Ninth Circuit for an award of attorney's fees and costs against the Petitioners for having filed a frivolous appeal. On March 2, 1992, the Ninth Circuit issued its Memorandum Decision holding (i) that the District Court had subject matter jurisdiction, (ii) that this Court's *Younger* mandate did not bar the District Court's dismissal with prejudice in the absence of its finding that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners or for other exceptional circumstances, and (iii) that Petitioners' appeal was frivolous for the reason that the outcome of the appeal was clearly apparent. In its March 2, 1992 Memorandum Decision, the Ninth Circuit awarded only double costs against the Petitioners and did not grant the Respondents' request for an award of attorney's fees. On

April 27, 1992, the Ninth Circuit denied Petitioners' "Petition for Rehearing *En Banc*." Thereafter, on May 11, 1992, some of the Respondents renewed their request for an award of attorney's fees against the Petitioners. On May 26, 1992, Petitioners opposed this renewed effort to obtain an award of attorney's fees on the grounds that the Ninth Circuit had already imposed sanctions. On June 12, 1992, the Ninth Circuit awarded attorney's fees on appeal to some of the Respondents.

The Ninth Circuit's final action in this case occurred on June 12, 1992. Therefore, the 90 day period prescribed in 28 U.S.C. §2101 (c) for filing a petition for writ of certiorari in this Court is based on the June 12, 1992 Ninth Circuit Order. This Court has jurisdiction to review the Ninth Circuit's memorandum decision and orders denying rehearing *en banc* and awarding of attorney's fees on appeal against the Petitioners pursuant to Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Court's review of this Petition will necessarily involve consideration of Article I, §9, cl. 3 and the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. Those constitutional provisions can be found respectively in Exhibit B of the Appendix at pp. B-1, B-2, B-3 and B-4, *infra*.

The Court's review of this Petition will also necessarily involve Section 1254 and Rules 8 and 41 of the Federal Rules of Civil Procedure of Title 28, and Section 1983 of Title 42, United States Code. Those statutes and rules are respectively reproduced in Exhibit B of the Appendix at pp. B-5, B-6, B-8, and B-10, *infra*.

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[1] "County Defendants" collectively refers to Respondents Alan D. Davidon, Millard Rowlette, Stephen D. Neely, Jerry Goddard, Pima County, Arizona, Greg Lunn, Dan Eckstrom, Ed Moore, Reg Morrison, and Raul Grijalva.

STATEMENT OF THE CASE

Upon being served with Petitioners' original complaint, the County Defendants[1] filed their Rule 8 motion to dismiss on June 15, 1990. The County Defendants first raised the issue that the Petitioners' original complaint was too long and incorporated too many exhibits. On June 28, 1990, Petitioners filed their opposition to the County Defendants' June 15, 1990 Rule 8 motion to dismiss. Among other things, Petitioners raised the issue that notice pleading was inadequate in civil rights cases and that pleading with particularity was required. Petitioners also detailed the rationale for the organization of their complaint and summarized the factual allegations pointing to the County Defendants' wrongful conduct.

Petitioners' June 28, 1990 opposition also referred to their increased pleading burden as a result of their claims for relief under 18 U.S.C. §§1961, *et. seq.*, and their requests for injunctive and declaratory relief relative to two ongoing state criminal prosecutions. Petitioners contended that the *Younger* doctrine mandated a heavy pleading obligation if federal interference could reasonably be expected. As a result of the foregoing, the District Court had actual notice of the Rule 8 theories of impermissible pleading as of June 15, 1990.

On or about July 19, 1990, Petitioners filed their Petition for Order to Show Cause (request for injunctive relief) and Memorandum of Points and Authorities in support thereof; Motion for Partial Summary Judgment for Declaratory Relief on the Inadmissibility of Illegally Obtained Testimony; Motion for Partial Summary Judgment for Declaratory Relief on the Insufficiency of the Pima County Cause CR-24054 Information, and Memorandum of Points and Authorities in support thereof; Motion for Partial Summary Judgment for Declaratory Relief on Prosecutorial Misconduct Infringing on Grand Jury Impartiality; Motion for Partial Summary Judgment for Declaratory Relief on the Insufficiency of the Pima County Cause CR-28738 Indictment, and Memorandum of Points and Authorities in support thereof; Motion for Partial Summary Judgment for Declaratory Relief that Unconstitutional Pleas are Inadmissible; Statement of Facts in Support of Motions for Partial Summary Judgment; and their Motion to Take Judicial Notice of Adjudicative Facts. Petitioners incorporated most of the averments

of their original complaint and their exhibits into these substantive motions. As can be discerned, Petitioners pleaded extensive facts in their original complaint and submitted extensive exhibits as they intended to immediately seek federal intervention and other equitable relief to unburden themselves from state criminal prosecutions which they believe had been undertaken in bad faith.

The District Court, by its July 20, 1990 Order, stayed all discovery in the case below and forbid Petitioners from filing pleadings other than those directed at the Respondents' dispositive motions. The District Court's July 20, 1990 Order also protected the Respondents from having to respond to Petitioners' Petition For Order To Show Cause and the five motions for partial summary judgment.

Petitioners responded with a motion for reconsideration and clarification on the grounds that Petitioners' RICO claims were not subject to the *Younger* mandate. Petitioners further moved the District Court for leave to amend and supplement their complaint. Petitioners' rationale was to add new facts to their complaint to further buttress the complaint against the *Younger* jurisdictional attack.

During a telephonic conference on September 7, 1990, the District Court granted Petitioners leave to amend their complaint, which leave was granted without qualification. The District Court also granted Petitioners motion to have the Court take judicial notice of the exhibits submitted with their original complaint. The District Court had the opportunity to warn Petitioners about its perception that Rule 8 had been violated and that Petitioners should take heed when amending their complaint, but it did not. The District Court granted Petitioners leave to amend when it knew Petitioners intended to enlarge the factual basis of their complaint and expand the number of exhibits. Moreover, the District Court granted Petitioners' motion to take judicial notice of three volumes of exhibits, which, for the most part, were pleadings filed in the state criminal proceedings.

While the District Court stayed Petitioners' discovery and prohibited Petitioners from filing any further pleadings except for responsive pleadings to Respondents dispositive motions pending resolution of those motions, the state court, in the matter of the state criminal proceedings, allowed Petitioners access to the theretofore sealed documents of the 83rd Pima County Grand Jury. Since Petitioners were barred from filing further pleadings, the District

Court's office was contacted to find out what procedure was appropriate to obtain an extension of time within which to file the amended complaint so that the newly discovered illegal grand jury evidence could be included in Petitioners' amended complaint to further buttress the FAC against the *Younger* jurisdictional attack.

On September 27, 1990, not only did the District Court not require the Petitioners to file a motion to enlarge the time to amend, but directly issued its minute entry order which, in pertinent part, stated:

> "Plaintiffs have informed the Court that they now have access to grand jury records and, additionally, will depose new witnesses pursuant to a state court order. This discovery may provide Plaintiffs with substantive modifications to their first amended complaint. Good cause appearing, therefore, it is hereby ORDERED that Plaintiffs may file their first amended complaint no later than October 19, 1990."

The foregoing September 27, 1990 District Court Minute Entry Order reveals the District Court's knowledge that Petitioners were seeking more time, not to reduce the size of their complaint nor the volume of exhibits, but to add critical factual allegations that would support their bad faith claim and buttress their complaint from the *Younger* jurisdictional attack. The District Court's September 27, 1990 Minute Entry Order does not forewarn Petitioners, in the Rule 8 context, that they should reduce the number of pages in their complaint and eliminate the exhibits filed in support of their claim that the state criminal proceedings were undertaken in bad faith without a reasonable expectation of obtaining valid convictions.

On October 18, 1990, Petitioners filed another motion to enlarge the time to file their amended complaint. In their motion, Petitioners detailed the ongoing discovery in the state criminal proceedings and the forthcoming deposition of Respondent Davidon. Again, Petitioners' motive was to obtain as much evidence as they could to amend their complaint to survive the *Younger* jurisdictional attack. The District Court did not respond until November 15, 1990, when it granted Petitioners' motion to enlarge time until December 17, 1990. The District Court did not seize the opportunity at that time to forewarn Petitioners to take heed of possible Rule 8 violations.

On November 15, 1990, the District Court issued its order vacating its September 7, 1990 order granting Petitioners' motion for

the District Court to take judicial notice. Specifically, the District Court said:

> "On September 7, 1990, the Court took judicial notice of court proceedings pursuant to Plaintiff's request, but permitted the defendants to file objections. After review of the objections the Court will vacate that ruling. These proceedings are far too complex to allow such broad-based and far reaching proceedings to be noticed at this time. The evidence presented by those proceedings must be weighed more carefully than judicial notice will allow.
> To the extent that such proceedings support Plaintiffs' factual positions in this case, relevant documents may be attached to support Plaintiffs' motions within the confines of the Federal Rules of Civil Procedure."

On October 26, 1990, the County Defendants filed their Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(c), Fed.R.Civ.P. Among other things, the County Defendants alleged Petitioners failed to identify the deprivation of any pre-existing federal constitutional or statutory right and raised the issue that the immunity of the County Defendants and the *Younger* doctrine precluded Petitioners from stating a valid claim for relief. In response, Petitioners filed their

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[2] As a matter of law, a grand jury investigation is not conducted in good faith unless it is used to conduct investigations that are in their inception exclusively criminal. In the Matter of Grand Jury Proceedings, Miller Brewing Company, 687 F.2d 1079 (7th Cir. 1982); citing, United States v. Proctor & Gamble, 356 U.S. 677, 683 (1958).

[3] Respondent Davidon declared that the State of Arizona had an interest in assisting the third-party civil litigants and that the purpose of providing the third-party civil litigants with access to the use-immunized depositions of Renee M. Jenkins, Donna Anderson, Ron Anderson and Shaftel was to overcome the obstruction of the Fifth Amendment to the civil litigants' discovery, to wit:

> Mr. Davidon, Speaking: "This meeting is present, or being conducted in part because a number of civil litigants wanted access to Renee Jenkins' testimony. Some of the lawyers present know that one or more persons from JNC's testimony will be available to them shortly. It is the State's interest or belief that the civil litigants have access to the most accurate and reliable information available to them without being obstructed by Fifth Amendment claims, and that is the effort we are endeavoring to accomplish today with this witness."

Sworn Statement Of Renee Marie Jenkins, January 5, 1988, p. 5, lines 10-19.

"Opposition to the County Defendants' October 26, 1990 Motion to Dismiss." The bulk of Petitioners' opposition provided a summary of the factual basis, legal analysis and identification of the pre-existing federal constitutional and statutory rights that gave rise to the liability of the County Defendants concerning the County Defendants' alleged wrongful conduct. Among other things, the alleged deprivations of federal Constitutional and statutory rights demonstrate:

1) that the 83rd Pima County Grand Jury's investigative and subpoena powers were invoked in bad faith[2] in the matter of 83-GJ-008 in that Respondent Davidon employed its investigative and subpoena powers to further the pecuniary interests of private third-party civil litigants in the JNC-related federal district court and bankruptcy litigation, all in violation of the Grand Jury Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment;[3]

2) that the use-immunized testimony of Renee Marie Jenkins (January 5, 1988), Donna Lynne Robinson (February 17, 1988), Ronald D. Anderson (February 18, 1988) and Timothy L. Shaftel (March 3, 1988) violated A.R.S. §13-4064, the Grand Jury Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, for the reasons that the grants of use-immunity were awarded (i) when Respondents Davidon and Judge Fleischman knew that none of the recalcitrant witnesses had appeared before any Grand Jury and invoked their Fifth Amendment privilege when questions were propounded to them, (ii) when Respondents Davidon and Judge Fleischman knew that no criminal complaint had been filed and, as a result, there was no pending criminal proceeding within the meaning of Rule 2.4, Ariz.R.Crim.P., 17 A.R.S. and, (iii) when Respondents Davidon and Judge Fleischman knew that the recalcitrant witnesses' use-immunized testimony was not to be taken in any criminal proceeding before a court or Grand Jury as required by A.R.S. §13-4064, but knew that such testimony was to be taken in the offices of private attorneys for the benefit of third-party civil litigants in the JNC-related federal district court and bankruptcy litigation;

3) that Respondent Davidon misled the 83rd Pima County Grand Jury to avoid its right to independently investigate possible criminal charges against JNC-related persons, all in violation of the Grand

Jury Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, in order to provide use-immunized testimony for the benefit of third-party civil litigants in the JNC-related federal district court and bankruptcy litigation;

4) that Respondent Judge Fleischman usurped jurisdiction not otherwise granted to him and acted in the clear absence of jurisdiction from approximately April 25, 1988 until November 21, 1988 by proceeding as a "one-man grand jury" pursuant to Rule 2.4, Ariz.R.Crim.P., 17 A.R.S., in the absence of a complaint having been filed, all in violation of Article III of the Arizona Constitution and the Due Process Clause of the Fourteenth Amendment;

5) that, on or about July 18, 1988, Respondent Judge Fleischman, without first establishing that the crime-fraud exception applied and in the complete absence of jurisdiction for the reasons cited in the previous sub-paragraph, knowingly and intentionally waived Petitioner Jenkins' attorney client privilege with Respondent Peter D. Beren, a right granted to Jenkins by A.R.S. §12-2234 and/or A.R.S. §13-4062, without notice to Jenkins and without providing a pre-deprivation hearing on behalf of Jenkins, all in violation of the Due Process Clause of the Fourteenth Amendment;

6) that the Pima County Cause CR-24054 Information is insufficient as a matter of law in that the theory of criminal liability averred in that charging document involves the intangible rights doctrine outlawed by this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987),[4] and fails to protect Jenkins' Sixth Amendment notice right as made obligatory upon the State of Arizona by the Due Process Clause of the Fourteenth Amendment, by failing to aver a valid theory of criminality;

7) that Petitioner Jenkins is being held for trial in Pima County Cause CR-24054 to answer for what is at best an *ex post facto* criminal violation expressly prohibited by Article 1, Section 9, Clause 3 of the United States Constitution since the Arizona Legislature enacted A.R.S. §13-2310C in response to this Court's *McNally* holding after Jenkins was held for trial in Pima County Cause CR-24054, all in vio-

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[4] The Arizona Supreme Court has held that federal decisions interpreting the federal mail fraud statute are persuasive in the construction of Arizona's fraudulent scheme statute, A.R.S. §13-2310. State v. Haas, 138 Ariz. 413, 418, 675 P. 2d 673 (1983).

lation of Article 1, Section 9, Clause 3 and the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

8) that Respondent Davidon initiated the criminal charges in Pima County Cause CR-28738 against Petitioner Jenkins for the constitutionally impermissible purpose of seeking vindictive retribution against Jenkins for having exercised his constitutionally protected right to file his June 29, 1989 Motion To Dismiss Pima County Cause CR-24054, in violation of the Due Process Clause of the Fourteenth Amendment;

9) that Respondent Davidon initiated the criminal charges in Pima County Cause CR-28738 against Petitioner Sumwalt, who is Jenkins' wife, for the impermissible purpose of selectively prosecuting Sumwalt to pressure Jenkins to capitulate, in violation of the Due Process Clause of the Fourteenth Amendment;

10) that Respondent Davidon unconstitutionally infringed upon the impartiality of the 92nd Pima County Grand Jury's ability to exercise independent judgment in the matter of 92-GJ-356 by misleading the 92nd Pima County Grand Jury as to the essential characteristics of an investment contract, in that he knowingly and intentionally failed to give proper legal instructions that transactions must involve an investment in money to comprise investment contracts and knowingly and intentionally obstructed the testimony of a Grand Jury witness to preclude the Grand Jury's understanding that the subject transactions did not involve an investment in money, thereby precluding the 92nd Pima County Grand Jury's proper probable cause inquiry into whether the subject transactions invoked the protection of Arizona's securities laws, all in violation of the Grand Jury Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment;

11) that the Pima County Cause CR-28738 Indictment is insufficient as a matter of law and fails to protect Jenkins' and Sumwalt's Sixth Amendment notice rights as made obligatory upon the State of Arizona by the Due Process Clause of the Fourteenth Amendment, on the grounds and for the reasons that the CR-28738 Indictment fails to allege the predicate factual basis that would allow a court to conclude that the subject transactions invoked the protection of Arizona's

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[5] On August 16, 1990, the Arizona Court of Appeals put an end to this scheme. See JNC Companies v. Meehan, 165 Ariz. 144, 797 P.2d 1 (Ariz.App. 1990), a copy of which can be found in Exhibit C of the Appendix at p. C-1, infra.

securities laws, by failing to allege facts that the transactions involved an investment in money, and lacks the requisite particularity in the non-securities counts to allow a court to conclude that, if true, the Indictment's allegations amount to the crimes charged;

12) that Respondent Davidon, in concert with Respondent Fred T. Boice, the trustee in bankruptcy for Jenkins, JNC and the JNC-related limited partnerships, among others, engendered the Pima County CR-28738 Indictment for the purpose of providing a basis for the acceptance of a plea agreement from Boice on behalf of JNC in furtherance of the scheme to effect a tax-free release of the JNC investors' obligations to pay their promissory notes owing to the JNC partnerships, in violation of the Fifth and Sixth Amendment and the Due Process Clause of the Fourteenth Amendment;[5]

13) that the JNC-related plea agreements of Steven J. Moddelmog, Philip S. DeMarie, James P. Scannell, Jr., William J. Daley, Peter D. Beren, Edward B. Kinney and Timothy L. Shaftel are legally insufficient in that they fail to allege facts that amount to the crimes charged and that the object of the foregoing plea agreements was to impair Petitioners' property rights in the JNC-related federal district court and bankruptcy litigation, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, by serving as a basis to explain Boice's failure to sue the JNC investors for collection on their promissory notes owing to the JNC limited partnerships; and,

14) that, in at least the case of the Kinney and Shaftel plea agreements, the plea agreements were accepted and sentences were imposed by Pima County Superior Court Judges, including Respondent Judge Velasco in the case of Kinney, who acted in the clear absence of jurisdiction, since they had previously recused themselves or had been disqualified pursuant to Rule 10.2, Ariz.R.Crim.P., 17 A.R.S. Such usurpation of jurisdiction was knowingly and intentionally undertaken to further impair Petitioners' property rights in the JNC-related federal district court and bankruptcy litigation, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, to serve as a basis to explain Boice's failure to sue the JNC investors to collect on their promissory notes owing to the JNC limited partnerships.

Petitioners lodged their opposition to the County Defendants' October 26, 1990 motion to dismiss and the exhibits filed in support thereof, pending the District Court's order granting leave to

file the oversized brief. The brief amounted to approximately 85 pages and the exhibits amounted to approximately 1.5 inches. On December 18, 1990, the District Court granted Petitioners' motion for leave to file the oversized brief.

On December 17, 1990, Petitioners again requested a four-day extension to file their first amended complaint. On December 18, 1990, the District Court granted this extension. Again, the District Court did not forewarn Petitioners to reduce the size of their complaint or the exhibits filed in support thereof. The Petitioners filed their FAC and exhibits in support thereof on December 21, 1990.

Respondents Boswell and Streich Lang filed their Rule 8 motion to dismiss on January 31, 1991. The County Defendants joined in that motion on February 5, 1991. The District Court's February 7, 1991 Order asserted that Rules 8(a), 8(e) and 41(b) governed its decision to dismiss Petitioners' FAC with prejudice for the reason that the complaint was too lengthy and the exhibits were too voluminous. The District Court "truly hoped that the Amended Complaint and Exhibits would be shortened so as to comply with the Federal Rules of Civil Procedure ("Rules")," and found that "against all odds, it had ballooned." Further, the District Court indicated that by dismissing Petitioners' FAC with prejudice pursuant to Rule 41(b), such dismissal operated as an adjudication upon the merits.

On February 22, 1991, Petitioners filed a motion for reconsideration for the reasons that the District Court failed to weigh the heavy pleading burden various courts have historically imposed on plaintiffs seeking (i) relief under 42 U.S.C. §1983, (ii) relief under the federal racketeering statute, (iii) federal court intervention in ongoing state court criminal proceedings, and (iv) money damages against defendants raising absolute and qualified immunity defenses. The District Court, on February 25, 1991, denied Petitioners' motion for reconsideration and motion for a stay in the state criminal proceedings, which was requested pursuant to Petitioners' previously filed motion for injunctive relief. Thereupon, the District Court entered its final judgment dismissing Petitioners' FAC with prejudice.

On February 26, 1991, Petitioners filed their notice of appeal seeking relief in the Ninth Circuit.

On May 7, 1991, Petitioners filed their "Motion to Entertain Motion To Vacate Void Judgment Pursuant To Rule 60(b)(4), Fed.R.Civ.P." in the District Court. Petitioners alleged that the

District Court's final judgment dismissing Petitioners' FAC with prejudice as an adjudication on the merits, was void for want jurisdiction.

Petitioners argued that in the absence of the District Court's bad faith finding, the District Court was barred by the *Younger* doctrine to enter a final judgment on the merits of Petitioners' claims for equitable relief and was without discretion, pursuant to *Deakins v. Monaghan*, 484 U.S. 193 (1988), to do anything but stay Petitioners' money damage claims. On May 10, 1991, the District Court denied Petitioners' Motion To Entertain Motion To Vacate Void Judgment Pursuant To Rule 60(b)(4), Fed.R.Civ.P., 28 U.S.C., declaring that it will await the Ninth Circuit's determination of the appeal.

On March 2, 1992, the Ninth Circuit issued its Memorandum Decision holding (i) that the District Court had subject matter jurisdiction, (ii) that this Court's *Younger* mandate did not bar the District Court's dismissal with prejudice even though the District Court did not find that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners or for other exceptional circumstances, and (iii) that Petitioners' appeal was frivolous for the reason that the outcome of the appeal was clearly apparent. On April 27, 1992, the Ninth Circuit denied Petitioners' "Petition for Rehearing En Banc." On June 12, 1992, the Ninth Circuit awarded attorney's fees on appeal to some of the Respondents.

REASONS FOR GRANTING THE WRIT

I.

In the absence of its finding that the state criminal proceedings against the Petitioners were undertaken in bad faith, to harass the Petitioners or for other exceptional circumstances, the District Court was barred by this Court's *Younger* doctrine from dismissing Petitioners' FAC with prejudice pursuant to Rules 8(a), 8(e) and 41(b), Federal Rules of Civil Procedure of Title 28, United States Code, and, as a result, the District Court's judgment of dismissal with prejudice is void for want of jurisdiction.

The Ninth Circuit in affirming the District Court's dismissal with prejudice, held that the District Court did not lack subject matter jurisdiction, and that the District Court was not barred by *Younger* from entering its judgment of dismissal with prejudice. The Court sanctioned the Petitioners for prosecuting a frivolous appeal. The Ninth Circuit held that its prior decisions dictate that *Younger* does not affect the District Court's subject matter jurisdiction, but only affects the exercise of its equitable jurisdiction.

This Court has previously held that federal courts are barred from interfering in ongoing state criminal proceedings in the absence of the court's finding that the state criminal proceedings had been undertaken in bad faith, to harass the criminal defendant or for other exceptional circumstances. This requirement has been the foundation of this Court's distinction between *Younger* dismissals and other forms of discretionary federal abstention. No decision of this Court since *Younger* has abrogated the oft cited principles of Federalism and comity upon which *Younger* is based. The District Court's and the Ninth Circuit's departure from *Younger* should not stand unless approved by this Court. Accordingly, review of this issue should be granted.

A. The *Younger* Principles.

The *Younger* district court, relying on *Dombrowski v. Pfister*, 380 U.S. 479 (1965), intervened in the *Younger* state criminal proceedings. *Younger*, 401 U.S. at 44. This Court reversed, finding the injunction to be "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* The *Younger* Court identified the reasons for this policy. First, the basic limitation traditionally imposed on the availability of equitable relief is that the remedy at law is inadequate. *Id.* Normally, a defendant in a state criminal proceeding will be able to raise his federal claims in the state courts, and thus his remedy at law will be adequate. *Id.* While pointing out that the primary basis for this limitation on equitable relief is historical, the *Younger* Court viewed it as a way of preventing "the erosion of the role of the jury" and the duplication of legal proceedings." *Id.* Then the Court added:

"This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of `comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fair best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and cleaner way to describe it, is referred to by many as `Our Federalism'..."
Id.

However, the *Younger* opinion did recognize some exceptions to its general command and identified occasions in which a federal injunction of state proceedings might be warranted. Pointing to its opinion in *Dombrowski*, the *Younger* Court indicated that if a prosecution were brought in bad faith or to harass the criminal defendants, federal injunctive relief would be available. *Younger*, 401 U.S. at 47-49.

This Court reinforced the *Younger* exception criteria in *Kugler v. Helfant*, 421 U.S. 117 (1975):

"Although the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution alone do not constitute "irreparable injury" in the special legal sense of that term, the Court in *Younger* left room for federal equitable intervention in a state criminal trial where there is a showing of "bad faith" or "harassment" by state officials responsible for the prosecution, where the state law to be applied in the criminal proceeding is "flagrantly and patently violative of express constitutional prohibitions," or where there exist other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." In the companion case of *Perez v. Ledesma*, the Court explained that "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."
Kugler, 421 U.S. at 123-4, [citations omitted].

Since Petitioners' complaint and FAC sought the District Court's intervention in ongoing state criminal proceedings and the Respondents raised *Younger* as a bar to the District Court's jurisdiction, the *Younger* doctrine precluded the District Court from exercising its jurisdiction over Petitioners' equitable claims for relief absent its finding that the state criminal proceedings had been undertaken in bad faith, to harass the criminal defendants or for other exceptional circumstances. *Younger, supra; Kugler, supra.*

B. *Younger* Operates As A Jurisdictional Bar.

This Court's prior decisions support the proposition that a federal district court is barred from interfering in an ongoing state criminal proceeding unless it finds that the state criminal proceeding was undertaken in bad faith, to harass the criminal defendants or for other exceptional circumstances.[6] *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975). The Court has characterized this bar as a "*Younger* dismissal." *Id.*

The Court has also been explicit in distinguishing a *Younger* dismissal from other forms of federal abstention. In *Gibson v. Berryhill*, 411 U.S. 564, 576 (1973), this Court held that "[u]nlike those situations where a federal court merely abstains from decision on federal questions until the resolution of underlying or related state law issues .... *Younger v. Harris* contemplates the outright dismissal of the federal suit." *Id.*

As a result, a *Younger* dismissal has been characterized as jurisdictional. Although Mr. Justice Kennedy did not cite *Gibson* in the following concurring opinion when he sat on a Ninth Circuit panel, *Gibson's* rationale is embodied in Mr. Justice Kennedy's assessment that *Younger* required dismissal for lack of jurisdiction, to wit:

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[6] Petitioners argued in their pleadings before the District Court that they had made a showing of bad faith, harassment or exceptional circumstances. However, it would have been quite anomalous for the District Court to have made such a finding to legitimize its jurisdiction then dismiss Petitioners' FAC for its length. Such action would run afoul of this Court's Foman teaching. Foman v. Davis, 371 U.S. 178 (1962) (It is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities).

"General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975)."

World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079, 1084 (9th Cir. 1987) (Kennedy, J., concurring).

Similarly, some academic commentators have likened the *Younger* doctrine to a federal subject-matter jurisdiction statute. See Gene R. Shreve, "Federal Injunctions and the Public Interest," 51 Geo.Wash.L.Rev. 382 at note 210 and related text.

Based on the foregoing, the *Younger* doctrine precludes federal district courts from reaching dismissal questions on other grounds. That is, in the instant case, the District Court was required by this Court's prior decisions to either make a finding that the state criminal proceedings had been undertaken in bad faith, to harass the criminal defendants or for other exceptional circumstances or to dismiss Petitioners' equitable claims for lack of jurisdiction pursuant to *Younger*.

This Court recently reaffirmed the proposition that a judgment entered by a court lacking jurisdiction is void. *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 608-609 (1990). Since the District Court failed to comply with this Court's *Younger* mandate, it lacked jurisdiction to enter a final judgment of dismissal with prejudice upon the merits pursuant to Rules 8(a), 8(e) and 41(b), Fed.R.Civ.P., 28 U.S.C., when the Respondents had raised *Younger* as a bar to the exercise of federal jurisdiction. As a result, the District Court's final judgment of dismissal with prejudice in the instant case is void for want of jurisdiction.

The Ninth Circuit had previously recognized *Younger's* mandate as a bar to federal court jurisdiction. See *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1985); *World Famous, supra;* and, *Lebbos v. Judges of Superior Court of Santa Clara County*, 883 F.2d 810 (9th Cir. 1989). Other circuits have also recognized that *Younger* operates as a jurisdictional bar, requiring a finding amounting to the *Younger* exception criteria before considering any other issue. See, *In re Fussell*, 928 F.2d 712 (5th Cir. 1991); *Barnette v. Evans*, 673 F.2d

1250 (11th Cir. 1982). As a result, either the Ninth Circuit has applied the law unequally to these Petitioners or has unilaterally departed from the well established constraints imposed by this Court on the jurisdiction of federal district court intervention in ongoing state criminal proceedings. In either case, this Court should grant review, reinforce the *Younger* mandate and vacate the District Court's final judgment of dismissal with prejudice in the instant case (i) for failing to comply with the *Younger* requirements and (ii) as void for want of jurisdiction.

II.

In the absence of its finding that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners or for other exceptional circumstances, the District Court had no discretion but to stay Petitioners' money damage claims pending resolution of the state criminal proceedings.

The Ninth Circuit's affirmation of the District Court's final judgment of dismissal with prejudice on the merits also offended this Court's mandate espoused in *Deakins v. Monaghan*, 484 U.S. 193 (1988). The Ninth Circuit's unexplained departure from *Deakins* should be corrected by this Court, necessitating review of this issue.

The import of *Deakins* in the instant case is that the District Court had no discretion to stay rather than dismiss Petitioners' claims for money damages. The *Deakins* Court held:

> "We need not decide the extent to which the *Younger* doctrine applies to a federal action seeking only monetary relief, however, because even if the *Younger* doctrine requires abstention here, the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding."
> *Id.*

As a result, the District Court had no discretion to dismiss Petitioners' money damage claims. Rather, the District Court could only stay such claims pending resolution of the state criminal proceedings.

In sum, the District Court had two choices--either make a finding that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners, or for other exceptional circumstances and intervene in the state criminal proceedings or, alternatively, dismiss Petitioners' equitable claims for relief under *Younger* and stay their money damage claims under *Deakins*. There is no middle ground. Since it failed to make a finding amounting to any of the Younger exception criteria, the District Court lacked jurisdiction to dismiss Petitioners' FAC pursuant to Rules 8(a), 8(e) and 41(b) of the Federal Rules of Civil Procedure in the absence of the requisite finding amounting to the *Younger* exception criteria.

III.

The District Court's final judgment of dismissal with prejudice pursuant to Rules 8(a), 8(e) and 41(b) was a clear abuse of discretion.

The Ninth Circuit affirmed the District Court's final judgment of dismissal with prejudice on the merits pursuant to Rules 8(a), 8(e) and 41(b), 28 U.S.C., sanctioned the Petitioners with double costs and awarded attorney's fees against them for filing a frivolous appeal because the outcome of the appeal was obvious. In its memorandum decision, however, the Ninth Circuit failed to address the heavy pleading burden Petitioners faced resulting from (i) their racketeering and civil rights claims, (ii) their request for federal intervention in ongoing state criminal proceedings and (iii) the absolute and qualified immunity defenses of some of the Respondents. This Court's review is required to restore the balance between pleading burdens imposed by this Court and the federal circuit courts of appeal versus the constraints of Rule 8 of the Federal Rules of Civil Procedure.

A. The District Court's Authorities Did Not Support Dismissal With Prejudice.

The District Court's Order relies on several Ninth Circuit decisions to support dismissal of Petitioners' FAC with prejudice. In

Schmidt v. Hermann, 614 F.2d 1221 (9th Cir. 1980), the district court had twice instructed the *Schmidt* plaintiff to amend his complaint to comply with Rule 8. The district court also focused on the *Schmidt* plaintiff's inability to particularize a claim within the meaning of Rule 9(b), Fed.R.Civ.P. *Schmidt*, 614 F.2d at 1223-1224. In *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981), the *Nevijel* district court also forewarned the *Nevijel* plaintiff about the Rule 8 violation and provided an opportunity to amend before dismissal with prejudice.

In *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985), the *Hatch* district court granted several motions to dismiss, any one of which was dispositive of the entire case. These included a motion to dismiss for failure to purge contempt, a motion to dismiss for limitations of action, a motion to dismiss on *res judicata* grounds, a motion to dismiss for failure to state a claim, and, finally, the Rule 8 motion to dismiss. *Hatch*, 758 F.2d at 414-415. The Ninth Circuit affirmed dismissal on the basis of all the foregoing. *Id.*

The last citation relied on by the District Court as authority for the basis of its dismissal Order is *In re Santa Barbara Like It Is Today Copyright*, 94 F.R.D. 105 (D.Nev. 1982). The Nevada district court dismissed the *Santa Barbara* first amended complaint for lack of clarity and because of the plaintiff's long history of noncompliance with court orders and continuous assertion of frivolous grounds. *Santa Barbara, supra.* For example, the *Santa Barbara* plaintiff made no attempt to weed out the Respondents against whom the court had held the plaintiff no longer had a valid claim of infringement due to the bar of the statute of limitations. *Santa Barbara*, 94 F.R.D. at 107. The *Santa Barbara* district court further lamented that the complaint was confusing as to what claims were asserted and any factual basis for the claims. *Santa Barbara*, 94 F.R.D. at 108. There was no attempt to link any of the alleged co-infringements with any specific infringements. *Id.* The *Santa Barbara* district court could not discern which Respondents were sued under the various claims because of the plaintiff's tangled web of incorporation by reference and incomprehensible grouping of the Respondents. *Id.*

The *Schmidt, Nevijel, Hatch* and *Santa Barbara* cases are all distinguishable from the case at bar. Other than a cursory indication that the civil rights laws were implicated in the *Nevijel* complaint, neither *Schmidt, Nevijel, Hatch* nor *Santa Barbara* dealt with the

plethora of heavy pleading matters arising in the instant litigation, including Petitioners' civil rights and racketeering claims, Petitioners' request for federal intervention in ongoing state criminal proceedings and the absolute and/or qualified immunity of the Respondents.

When confronted with having to plead claims involved in these areas, it is imperative that Petitioners particularize their pleading of facts and evidence in order to satisfy the threshold pleading requirements established by this Court and the Ninth Circuit. It is unreasonable and unfair, given these pleading requirements, to measure Petitioners' FAC against complaints that can survive with mere notice pleading.

B. Limitations Of Rule 8 Applicability.

While a complaint which is prolix and replete with vague, immaterial, and evidentiary allegations, or which contains involved and repetitious verbiage, usually constitutes a violation of Rule 8(e)(1), Fed.R.Civ.P., a plaintiff should not be required to forego factual allegations in order that he may state his contentions in a short and concise form. *Cole v. Pitt*, 153 USPQ 446 (DC NC 1967). The appropriate length of a complaint depends on the type of case involved, and averments should not be stricken unless they have no bearing on the subject matter. *Sunbeam Corp. v. Payless Drug Stores*, 113 F.Supp. 31 (DC Cal 1953).

Although attorneys should make a conscientious effort to particularize the issues where a protracted trial, involving extensive testimony and exhibits is necessary, where the number and variety of issues make for extensive pleadings in a case, duplications of factual allegations are often necessary to place a series of claims in proper context. *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 271 (8th Cir. 1969). Under such circumstances, a complaint must be sufficiently clear and understandable so that the defendant is not prejudiced by it. *Id.* It is each individual count of a complaint which should be tested for simplicity and brevity under the requirements of Rule 8(e)(1), Fed.R.Civ.P., not the entire complaint as an indiscriminate whole. *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956). The mere incorporation of additional counts should not in itself be regarded as necessarily tending to defeat the requirement of Rule 8(e)(1). *Id.*

Matters requiring averments stated with particularity or more detailed and evidentiary pleading, must be harmonized with Rule 8, Fed.R.Civ.P. *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975); *DuPont v. Wyly*, 61 F.R.D. 615 (DC Del 1973). Finally, it will generally be an abuse of discretion to deny leave to amend a complaint when dismissing a nonfrivolous original complaint on the sole ground that it does not constitute a short and plain statement. *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2nd Cir. 1988). Dismissal is usually confined to those instances when the true substance, if any, is well disguised. *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969). The policy of the federal rules is to permit liberal amendment to preclude the determination of claims from becoming a technical exercise in the fine points of pleading. *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990); *citing*, *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981).

The most important concern the District Court should have in weighing the Rule 8 arguments against Petitioners' pleading burden, is that it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. *Foman, supra.* The Federal Rules specifically reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. *Foman*, 371 U.S. at 181-182. The Rules themselves provide that they are to be construed to secure the just, speedy and inexpensive determination of every action. *Id.*

C. Civil Rights Claims Mandate Enhanced Pleading.

In *Butz v. Economou*, 438 U.S. 478 (1978), this Court recognized that general conclusory allegations that Government actors had breached consitutional rights could unduly enmesh them in burdensome litigation, and it called for a firm application of the Federal Rules of Civil Procedure and for dismissal of insubstantial

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[7] Similarly, every circuit has articulated a requirement of particularity in pleading civil rights claims. Hobson v. Wilson, 737 F.2d 1, 31 (DC Cir. 1984).

claims on summary judgment.[7] Petitioners have alleged thirty claims for relief arising under 42 U.S.C. §1983.

Seventeen of these claims seek either injunctive or declaratory relief, while 13 claims seek money damages. The equitable relief claims are stated in an open-ended fashion as to all Respondents. The money damage claims seek relief against specified Respondents. As a result, in order to comply with the enhanced pleading burden required by *Butz*, Petitioners have an obligation to plead sufficient facts to establish the deprivation of a pre-existing federal or constitutional right and an unconstitutional motive. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

D. Racketeering Claims Mandate Enhanced Pleading.

Federal Rule of Civil Procedure 9(b), which requires that allegations of fraud specify the circumstances of the alleged fraud "with particularity," applies to fraud allegations in a civil RICO complaint. *Haroco, Inc. v. American National Bank and Trust Co.*, 747 F.2d 384, 405 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). The court in *H.G. Gallimore, Inc. v. Abdula*, 652 F.Supp. 437, 441 (N.D. Ill. 1987), explained the operation of Rule 9(b) in a RICO context as follows: "To satisfy Rule 9(b), the plaintiff must describe the time, place, particular contents of the false representations, the identity of the party making the misrepresentation, and the consequences of the misrepresentation. Where there are multiple Respondents, the complaint must inform each defendant of the specific fraudulent acts justifying his inclusion in the count." (Citations omitted). A violation of 18 U.S.C. §1962(c) "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted).

E. Federal Interference In State Criminal Proceedings Mandates Enhanced Pleading.

Petitioners' equitable claims would be dismissed pursuant to the *Younger* doctrine absent Petitioners' allegations amounting to the *Younger* exception criteria. Given this Court's policy against federal

interference in ongoing state criminal proceedings absent the requisite finding amounting to the *Younger* exception criteria, it goes without saying that Petitioners are faced with a heavy pleading burden to engender any equitable relief from the federal courts.

F. Absolute And Qualified Immunity Defenses Of The Respondents Mandates Heavy Pleading Burden, Including Pleading Evidence.

Upon being served with a complaint which lacks sufficient nonconclusory allegations of evidence of unlawful intent to commit a constitutional violation, a public official who would ordinarily be entitled to raise a qualified immunity defense, and who wishes to avoid discovery, may either move for dismissal for failure to state a claim, or file an answer and move for judgment on the pleadings. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). The Ninth Circuit had adopted the rule that, in order to survive a motion to dismiss, plaintiffs must state in their complaint particularized allegations setting forth the evidence of unlawful intent. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988). It goes without saying that Petitioners face an equally stringent pleading burden to make a showing that Respondents who raise absolute immunity as a bar to prosecution are not entitled to same. Thus, as a result of filing claims against Respondents who have raised both absolute and qualified immunity as either a bar to prosecution or as a defense, Petitioners are saddled with a heavy burden to particularize their complaint with facts that eviscerate said immunities, including pleading evidence, in order to survive pre-trial dismissal.

G. The Procedural History Of This Case Fails To Support The District Court's Order.

The procedural history of this case clearly fails to support the District Court's final judgment of dismissal with prejudice. The District Court had notice of a Rule 8 consideration on or about June 15, 1990 when the County Respondents filed their Rule 8 motion to

dismiss. It did not countenance that motion and forewarn Petitioners when it granted Petitioners leave to unconditionally amend their original complaint to add incremental factual allegations derived from ongoing discovery in the state criminal proceedings.

Concomitant with granting leave to amend, the District Court granted Petitioners motion have the Court take judicial notice of the exhibits submitted in support of their original complaint. Nary a word was uttered by the District Court concerning the length of Petitioners' original complaint or the volume of their exhibits. Later, after the District Court recanted its decision to take judicial notice, it nonetheless told Petitioners they could submit the exhibits in support of their motions.

The District Court granted Petitioners two extensions within which to file their amended complaint, recognizing in its own orders that Petitioners were obtaining previously secreted evidence that would support their prayer for federal interference. The District Court transmogrified the basis for those extensions in its dismissal order to sanction Petitioners for not having utilized the opportunity to amend to reduce the size of their complaint and the related exhibits.

On or about July 19, 1990, Petitioners filed five motions for partial summary judgment, a petition for injunctive relief and a motion to have the Court take judicial notice of substantially all of the exhibits filed in support of their Complaint. These motions incorporated the majority of the original complaint's averments and exhibits. The five motions for summary judgment and the petition for injunctive relief focus the complaint's averments and exhibits into meaningful relief. The District Court's abuse of discretion is exacerbated by the clear preponderance of constitutional violations cited in the FAC and exhibits submitted in support thereof. Accordingly, the incorporation of the complaint's averments and exhibits into these substantive motions for partial summary judgment and petition for federal court intervention precluded reducing Petitioners' FAC to fifteen pages with no exhibits, to comply with the District Court's February 7, 1991 Order.

The District Court cannot point to a single instance where it forewarned the Petitioners, prior to its February 7, 1991 Order, that it found Petitioners' original complaint or FAC too lengthy and their exhibits too voluminous. An impartial observer would conclude that the District Court, by the orders it previously issued, has lulled Peti-

tioners into believing that it was acceptable to enlarge their original complaint taking into account the newly discovered grand jury and other evidence. Based on the foregoing, the District Court clearly abused its discretion by dismissing Petitioners' FAC with prejudice pursuant to Rules 8(a), 8(e) and 41(b) and, as a result, its final judgment of dismissal with prejudice should be reversed.

IV.

The Ninth Circuit abused its discretion when it found Petitioners' appeal to be frivolous and imposed sanctions of double costs and an award of attorney's fees against Petitioners.

Even if Petitioners are wrong in their argument that the *Younger* doctrine barred the District Court's final judgment of dismissal with prejudice in the absence of its finding amounting to the *Younger* exception criteria, the extant decisional law of this Court and of the Ninth Circuit provided reasonable grounds for the Petitioners' argument that *Younger* barred the District Court's interference in the state criminal proceedings by entering a judgment on the merits over the same equitable claims and issues that Petitioners have raised in the ongoing state criminal proceedings. Likewise, given the substantial authority that has altered the pleading requirements in cases involving racketeering and civil rights claims, in cases involving requests for federal intervention in ongoing state criminal proceedings and in cases involving the absolute and qualified immunity defenses of the defendants, the determination of how much or how little pleading is required is certainly sufficiently murky to preclude sanctions on appeal. In the instant case, the Ninth Circuit's award of double costs and attorney's fees on appeal must be reversed, less other similarly situated civil rights litigants be intimidated from thoroughly pleading their claims to overcome pleading burdens historically imposed by the courts of this country.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

Jack J. Rappeport
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Counsel for Petitioners

FILED
MAR 2 1992
CATHY A. CATTERSON, CLERK

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID RANDALL JENKINS; STACIA LEE SUMWALT; THE JNC COMPANIES,

Plaintiffs/
Appellants,

V.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney; MILLARD ROWLETTE, in his official capacity as Deputy Pima County Attorney; STEPHEN D. NEELY, in his official capacity as Pima County Attorney; JERRY GODDARD, individually; PIMA COUNTY, a body politic and corporate; GREG LUNN, in his official capacity as Pima County Supervisor for District 1; DAN ECKSTROM, in his official capacity as

No. 91-15371

D.C. No.
CV-90-00305-WDB

MEMORANDUM*

Pima County Supervisor for District 2; ED MOORE, in his official capacity as Pima County Supervisor for District 3; REG MORRISON, in his official capacity as Pima County Supervisor for District 4; RAUL GRIJALVA, in his official capacity as Pima County Supervisor for District 5; PIMA COUNTY SUPERIOR COURT, Pima County, Arizona; LAWRENCE FLEISCHMAN, in his official capacity as Judge of Pima County Superior Courts Division 11; BERNARDO P. VELASCO, in his official capacity as Judge of Pima County Superior Courts Division 11; FRED T. BOICE, individually and in his official capacity as trustee in bankruptcy; PETER DAVID BEREN, individually; SUSAN G. BOSWELL, individually; STREICH LANG, P.A. a professional law association, et al.,

Defendants/
Appellees.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District
Court for the District of Arizona
William D. Browning, District Judge,
Presiding

Submitted February 10, 1992**
San Francisco, California

Before: FLETCHER, D.W. NELSON and
FERNANDEZ, Circuit Judges.

David Jenkins (Jenkins), Stacia Sumwalt (Sumwalt), and The JNC Companies (JNC) appeal the dismissal of their civil rights action for failure to comply with Rule 8 of the Federal Rules of Civil Procedure. We affirm, and order the payment of double costs to certain of the appellees.

FACTUAL AND PROCEDURAL BACKGROUND

In May of 1990, Jenkins, Sumwalt, and JNC file a 373-page complaint alleging civil rights and RICO violations by numerous state officials. Appellants sought injunctive relief against a pending state criminal proceeding. They later sought leave to file "an amended and supplemented complaint," and on September 7, 1990, the district court granted them 20 days in which to file an amended complaint. On September 27, 1990, the district court gave appellants until October 19 to file their amended complaint. Upon their request the district court later extended the deadline to December 17, 1990, and granted a final extension until December 21, 1990. In connection with an oversized memorandum filed by appellants, the district court stated

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** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

in a December 19 Minute Order that "[t]his minute entry will serve as notice to counsel that all future pleadings and briefs in this case will conform to the Local Rules absent extraordinary good cause."

Appellants filed their 422-page amended complaint on December 21, 1990, along with approximately 2,200 pages of exhibits. The amended complaint named 22 additional defendants. In its order of February 7, 1991 the district court held that the complaint violated Rule 8 as well as Rule 21, and ordered the complaint dismissed with prejudice. The court gave appellants 10 days in which to file a 15-page complaint. Instead of further amending their complaint, they filed a motion for reconsideration on February 22, 1991, which the district court denied.

STANDARD OF REVIEW

The existence of subject matter jurisdiction is reviewed de novo. Kruse v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, __U.S. __, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990). A dismissal under Federal Rule of Civil Procedure 41(b) is reviewed for abuse of discretion. Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981).

Under Younger v. Harris, principles of comity and federalism dictate that federal courts generally abstain from enjoining state criminal proceedings. 401 U.S. 37, 42, 91 S. Ct. 746, 750, 27 L. Ed. 2d 669 (1971). In the district court the appellants sought an injunction against a pending state criminal proceeding. They argued that abstention was improper because the state prosecution was brought in bad faith. See Younger, 401 U.S. at 48, 91 S. Ct. at 752 (bad faith exception to abstention doctrine). The appellants now argue that Younger abstention is jurisdictional, and that the district court lacked jurisdiction to dismiss the complaint with prejudice before deciding whether abstention was proper. We have held, however, that Younger abstention does not implicate subject matter jurisdiction. Hydrostorage v. Northern Cal. Boilermakers, 891 F.2d 719, 725 (9th Cir. 1989), cert. denied, __U.S. __, 111 S. Ct. 72, 112 L. Ed. 2d 46 (1990). The district court therefore had jurisdiction to dismiss the complaint regardless of whether abstention was appropriate.

B. Dismissal

Rule 8 requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," and that '[e]ach averment of a pleading . . . be simple, concise, and direct." Fed R. Civ. P. 8(a), 8(e)(1). If a complaint does not comply with Rule 8, it may be dismissed with prejudice pursuant to Rule 41(b). Nevijel, 651 F.2d at 673. The appellants maintain that they faced enhanced pleading requirements with respect to their civil rights and RICO claims. Regardless of the complexity of the case, however, a 422-page complaint, accompanied by 2,200 pages of exhibits, does not constitute a "short and plain statement" of the claim for relief. Fed R. Civ. P. 8(a).

When faced with a violation of Rule 8 the district court should reasonably explore possible and meaningful alternatives to dismissal, but need not exhaust all alternatives before finally dismissing a case. Nevijel, 651 F.2d at 674. In the present case appellants were given the opportunity to amend their complaint to comply with Rule 8, their failure to amend, and the addition of 22 defendants without leave of court, the district court did not abuse its discretion by dismissing the complaint with prejudice. See Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir.) (no abuse of discretion to dismiss 70-page confusing and conclusory complaint), cert. denied, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed. 2d 555 (1985); Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980) (no abuse of discretion in dismissing 30-page complaint that was a "confusing statement of a non-existing cause of action").

C. Sanctions

Appellees Pima County, State of Arizona, Fred T. Boice, and Peter David Beren request that the appellants be sanction for filing a frivolous appeal. See Fed. R. App. P. 38. "An appeal is frivolous when the result is obvious or the appellants' arguments are wholly without merit." Bell v. City of Kellogg, 922 F.2d 1418, 1425 (9th Cir. 1991). Sanctions pursuant to Rule 38 are appropriate in the present case. The argument that the district court lacked jurisdiction to dismiss the present action for procedural violations until the district

ruled on the propriety of Younger abstention is wholly without merit. The argument that the amended complaint did not violate Rule 8 is also wholly without merit. The appellants have clearly failed to comply with the Rules of Civil Procedure. See Nevijel, 651 F.2d at 675 (imposing sanctions on appellant who challenged Rule 8 dismissal). Indeed, this case at once presents us with the apogee of pertinacity and the nadir of practice. Appellants shall pay double costs to appellees Pima County, State of Arizona, Fred T. Boice, and Peter David Beren.

AFFIRMED, with payment of double costs as described above

FILED
APRIL 27, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID RANDALL JENKINS; et al.,

Plaintiffs-Appellants,

vs.

ALAN D. DAVIDON, et al.,

Defendants-Appellees.

No. 91-15371

ORDER

Before: FLETCHER, D.W. NELSON and FERNANDEZ, Circuit Judges.

Appellants' petition for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing en banc is accordingly DENIED.

FILED
JUN 12 1992
CATHY A. CATTERSON, CLERK

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID RANDALL JENKINS; STACIA LEE SUMWALT; THE JNC COMPANIES,

Plaintiffs/
Appellants,

V.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney; MILLARD ROWLETTE, in his official capacity as Deputy Pima County Attorney; STEPHEN D. NEELY, in his official capacity as Pima County Attorney; JERRY GODDARD, individually; PIMA COUNTY, a body politic and corporate; GREG LUNN, in his official capacity as Pima County Supervisor for District 1; DAN ECKSTROM, in his official capacity as

No. 91-15371

D.C. No.
CV-90-00305-WDB

ORDER REGARDING
SANCTIONS

Pima County Supervisor for District 2; ED MOORE, in his official capacity as Pima County Supervisor for District 3; REG MORRISON, in his official capacity as Pima County Supervisor for District 4; RAUL GRIJALVA, in his official capacity as Pima County Supervisor for District 5; PIMA COUNTY SUPERIOR COURT, Pima County, Arizona; LAWRENCE FLEISCHMAN, in his official capacity as Judge of Pima County Superior Courts Division 11; BERNARDO P. VELASCO, in his official capacity as Judge of Pima County Superior Courts Division 11; FRED T. BOICE, individually and in his official capacity as trustee in bankruptcy; PETER DAVID BEREN, individually; SUSAN G. BOSWELL, individually; STREICH LANG, P.A. a professional law association, et al.,

Defendants/
Appellees.

Before: FLETCHER, D.W. NELSON and
FERNANDEZ, Circuit Judges.

The court grants the request for attorneys fees on appeal filed on May 12, 1992 by Pima County, Arizona. F.R.A.P. 38.

Therefore, it is hereby ordered that David Randall Jenkins, Stacia Lee Sumwalt, the JNC Companies, and each of them, jointly and severally, pay to Pima County, Arizona, the sum of $7,064.76 as attorneys fees and legal research expenses, in addition to the double costs heretofore awarded.

FILED
FEB 7-1991
RICHARD H. WEARE, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DAVID RANDALL JENKINS, et al.,	
Plaintiffs,	No. CIV 90-305-TUC-WDB
v.	
ALAN D. DAVIDON, et al.,	ORDER
Defendants.	

Pending before the Court is plaintiffs' First Amended Complaint. For the following reasons, this case will be dismissed with prejudice.

OPINION AND ORDER

On May 23, 1990, plaintiffs filed their "Complaint for violation of 42 U.S.C. § 1983; etc." That Complaint consisted on 373 pages. Exhibits to the Complaint occupied roughly 1,875 pages. In September 1990, plaintiffs sought to amend the Complaint. In its September 7, 1990 Minute Entry Order, the Court granted plaintiffs' Motion to Amend. The Amended Complaint was to be filed within 20 days. On the twentieth day, at plaintiffs' request, the Court granted an extension until October 19, 1990. See September 27, 1990 Minute Entry Order. On October 18, 1990, plaintiffs again moved for an extension. In its November 14, 1990 Order, the Court gave plaintiffs until December 17, 1990 to file their Amended Complaint. On December 17, 1990, plaintiffs moved for an extension until December 21, 1990.

In its December 18, 1990 Order, this final extension was granted. In its December 19, 1990 Minute Order, pursuant to plaintiffs' filing of a related (and Oversized) brief, the Court said: "This minute entry will serve as notice to counsel that all future pleadings and briefs in this case will conform to the Local Rules absent extraordinary good cause . . ." (emphasis in original). Throughout this delay, the Court truly hoped that the Amended Complaint and Exhibits would be shortened so as to comply with the Federal Rules of Civil Procedure ("Rules").

On December 21, 1990, the much-awaited First mended Complaint arrived. Against all odds, it had ballooned. The First Amended Complaint occupies an incredible 422 pages. Its Exhibits amounted to roughly 2,250 pages. Together, the First Amended Complaint and Exhibits stand 11 inches tall. Further, in the First Amended Complaint, plaintiffs seek to add 22 additional defendants, but make no attempt at compliance with FED. R. Civ. P. 21. These prolix documents so plainly violate the letter and spirit of the Rules as to warrant dismissal.

Rules 8(a), 8(e), and 41(b) govern this decision. Rule 8(a) requires a "short and plain statement of the claim." Rule 8(e) requires that each "averment of the pleading shall be simple, concise, and direct." Rule 41(b) provides that when plaintiff fails to "comply with these rules or any order of the court," the action may be dismissed. Further, a dismissal "under this subdivision . . . operates as an adjudication upon the merits."

Several Ninth Circuit cases are on-point. They are Schmidt v. Herrmann, 614 F.2d 1221 (9th Cir. 1980); Nevijel v. North Coast Life Ins. Co., 651 F.2d 671 (9th Cir. 1981); and Hatch v. Reliance Ins. Co., 758 F.2d 409 (9th Cir. 1985). See also In re Santa Barbara Like It Is Today Copyright Infringement Litig., 94 F.R.D. 105 (D. Nev. 1982).

In Nevijel, the Ninth Circuit noted that a complaint which fails to comply with Rules 8(a) and 8(e) may be dismissed with prejudice pursuant to Rule 41(b). Nevijel, 651 F.2d at 673. In reviewing the district court's decision to dismiss under Rule 41(b), the Ninth Circuit considered whether the lower court "might have first adopted other less drastic alternatives." Id. at 674. less drastic alternatives include allowing amended complaints, additional time, and association of "experienced counsel." Id. However, the Nevijel court said:

Though there are a wide variety of sanctions short of dismissal

available, the district court need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored, bearing in mind the drastic foreclosure of rights that dismissal effects.
Id.

Here, the Court believes that it reasonably considered less drastic alternatives. As indicated, supra, plaintiffs were given leave to amend and numerous extensions to do so. Nonetheless, the First Amended Complaint and Exhibits thereto swelled to massive proportions.

The above-cited Ninth Circuit cases provide guidance for this Court in its search for Rule 8 violations. In Schmidt, the second amended complaint was 30 pages long. Schmidt, 614 F.2d at 1224. In Nevijel, the original complaint was 48 pages long with 14 pages of addenda and 9 pages of exhibits. The amended complaint was 23 pages long with 24 pages of addenda. Nevijel, 651 F.2d at 674. In Hatch, 758 F.2d 415. Additionally, each of these documents was found verbose, confusing, and conclusory. Schmidt, 614 F.2d at 1224; Nevijel, 651 F.2d at 674; Hatch, 758 F.2d at 415.

Here, the Complaints far exceed lengths found violative by the Ninth Circuit. Further, they are fatally verbose, confusing, and conclusory. It is entirely unfair and unrealistic to expect defendants and the Court to glean plaintiffs' claims from such a tome. In affirming the judgment of dismissal with prejudice, the Nevijel court wisely stated:
The right of these defendants to be free from this costly and harassing litigation and the rights of litigants awaiting their turns to have their matters resolved must be considered . . . .
Nevijel, 651 F.2d at 675.

Further, the Court notes that its decision partially rests on plaintiffs' naming of additional defendants without leave. This violation of Rule 21 constitutes on "aggravat[ing] circumstance[]," further supporting dismissal with prejudice. Nevijel, 651 F.2d at 674. Finally, the Court has reviewed the "history of . . . [this] . . . litigation" and other related cases and finds that dismissal is warranted. Id.

Therefore, IT IS ORDERED:

(1) Plaintiffs' Complaint and First Amended Complaint are DISMISSED with prejudice;

(2) Plaintiffs are given ten (10) days from the date of this Order in which to further amend their Complaint. The Court will allow amendment with this caveat: After reviewing numerous civil rights complaints of this nature, the Court believes that a reasonable length for such complaints is fifteen (15) pages, double-spaced. Moreover, the Court does not believe that supporting exhibits are necessary at this early stage of litigation. The Court also notes that no part of the previous Complaints or other pleadings must fully comply with the applicable Rules, federal and local. Further, the Court will not grant any extension in which to file an Amended Complaint. Failure to follow theses guidelines will result in complete and final dismissal with prejudice and without notice by the Clerk of the Court; and

(3) All pending Motions are DENIED as moot.

Dated this 7 day of February 1991.

/s/
William D. Browning
U.S. District Judge

COPY
Original Filed On
FEB 2__, 1991

United States District Court
RICHARD H. WEARE, CLERK
U.S. DISTRICT COURT
DISTRICT OF ARIZONA

____DISTRICT OF __ARIZONA

DAVID RANDALL JENKINS,
et al.,

JUDGMENT IN A
CIVIL CASE

v.

ALAN D. DAVIDON,
et al.,

CASE NUMBER:
CIV-90-305-TUC-WDB

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX**Decision by Court**. This action came to under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is DISMISSED with prejudice.

___February 25, 1991_____RICHARD H. WEARE
DateClerk

(By) Deputy Clerk

FILED
FEB 25, 1991
RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DAVID RANDALL JENKINS, et al.,	
Plaintiffs,	No. CIV 90-305-TUC-WDB
v.	
ALAN D. DAVIDON, et al.,	ORDER
Defendants.	

Pending before the Court is plaintiffs' "Motion for Reconsideration of the Court's 2/7/91 Order; Alternatively, Application for Stay of State Court Criminal Proceedings Pending Ninth Circuit Review." For the following reasons, the Motion will be denied and the entire case will be dismissed with prejudice.

OPINION AND ORDER

Plaintiffs move the Court to reconsider its February 7, 1991 Order pursuant to Fed. R. Civ. P. 59. After reviewing the Motion, Statement of Facts, past pleadings, and Orders, the Court declines to reverse itself. Plaintiffs have not presented the Court with any persuasive evidence indicating that it made a manifest error o flaw or

fact. Further, they present no newly discovered evidence. See Brown v. Wright, 588 F.2d 708 (9th Cir. 1978).

In its February 7, 1991 Order, the Court gave plaintiffs ten days in which to file another Amended Complaint. Under Fed. R. Civ. P. 6(a), the correct ten day computation gave plaintiffs until 12:00 midnight, Friday, February 22, 1991. No Amended Complaint, however, was filed. The February 7, 1991 Order also held that "[f]ailure to follow these guidelines will result in complete and final dismissal with prejudice and without notice by the Clerk of the Court."

Therefore, IT IS ORDERED:

(1) Plaintiffs' "Motion for Reconsideration of the Court's 2/7/91 Order; Alternatively, Application for Stay of State Court Criminal Proceedings Pending Ninth Circuit Review" is DENIED; and

(2) This ~~case~~ is DISMISSED with PREJUDICE.

Dated this ___ day of February 1991.

William D. Browning
U.S. District Judge

United States Constitution, Article I,
§9, cl. 3. Bills of Attainder and Ex Post Facto Laws.

No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment of the Constitution of the United States:

Amendment [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States:

Amendment [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crim shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment of the Constitution of the United States:

Amendment [XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCA 1254
28 U.S.C.A. s 1254

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 81—SUPREME COURT
COPR. (c) WEST 1992 No Claim to Orig. Govt. Works
Current through P.L. 102-255, approved 3-12-92

s 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928.) (As amended June 27, 1988, Pub.L. 100-352, s 2(a), (b), 102 Stat. 662.)

UNITED STATES CODE
RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
III. PLEADINGS AND MOTIONS
COPR. (c) WEST 1992 No Claim to Orig. Govt. Works
Amendments received to 5-1-92

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration

and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

UNITED STATES CODE ANNOTATED
RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VI. TRIALS
COPR. (c) WEST 1992 No Claim to Orig. Govt. Works
Amendments received to 3-1-92

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack

of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross- claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.) (As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

UNITED STATES CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21—CIVIL RIGHTS
SUBCHAPTER I—GENERALLY
COPR. (c) WEST 1992 No Claim to Orig. Govt. Works
Current through P.L. 102-284, approved 5-14-92

s 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Filed by Clerk
Aug 16 1990
Court of Appeals
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE JNC COMPANIES, an Arizona corporation Petitioner, v. THE HONORABLE THOMAS MEEHAN, a Judge for THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, Respondent, and FRED T. BOICE, in his official capacity as trustee in bankruptcy for The JNC Companies; THE STATE OF ARIZONA, Real Parties in Interest	2-CA-SA 90-0113 Department B OPINION

SPECIAL ACTION PROCEEDINGS
RELIEF GRANTED

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R O L L, Presiding Judge.

Petitioner The JNC Companies (JNC) seeks special action relief from the trial court's order declaring that JNC was represented by counsel selected by JNC's trustee in bankruptcy (Trustee) rather than counsel chosen by JNC's board of directors (board). Because JNC has no equally plain, speedy and adequate remedy by appeal and because we conclude that the trial court abused its discretion, we accept jurisdiction and grant relief. Ariz.R.P.Spec.Action 1, 3, 17B A.R.S.

FACTS AND PROCEDURAL HISTORY

In September of 1987, JNC, an Arizona corporation, filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code (the Code). 11 U.S.C. ss 1101, et seq. Real party in interest Fred T. Boice was appointed Trustee. In November of 1988, the Pima County Attorney's office filed a criminal complaint against JNC and Randall Jenkins, president and majority shareholder of JNC, in CR-24054, alleging numerous counts of commercial bribery, fraudulent schemes and artifices, criminal enterprise and securities fraud. In June of 1989, Jenkins filed a motion to

dismiss all charges pursuant to Ariz.R.Crim.P. 16.5(b), 17 A.R.S., or in the alternative, a motion to remand for a finding of probable cause pursuant to Rule 5.5. The motion was denied in October. Jenkins sought special action relief and this court declined to accept jurisdiction.

On September 13, 1989, Jenkins, JNC and other parties were indicted on numerous felony counts, including securities law violations, in CR-28738, the underlying proceeding. The Trustee subsequently notified Jenkins of his intention to have JNC enter into a plea agreement in CR-28738 and sought authorization from the bankruptcy court. Through his bankruptcy attorney, Jenkins filed a motion in bankruptcy court opposing the Trustee's plea bargaining on behalf of JNC. Thereafter, the bankruptcy court entered a minute entry order on January 2, 1990, authorizing the Trustee to plea bargain on behalf of JNC in both pending criminal matters. During the same period of time, JNC's board retained counsel to represent JNC in the criminal proceedings. On behalf of JNC, that counsel filed a motion in superior court to dismiss, a motion for appointment of independent counsel, a motion for determination of JNC's indigency and a motion to disqualify the Trustee, seeking a ruling on whether the Trustee could proceed with the proposed JNC plea agreement.

On June 1, 1990, the board-retained JNC counsel and Jenkins filed a motion in both criminal proceedings for a change of judge for cause. On July 3, 1990, at the hearing on JNC's motion, respondent presiding judge of the Pima County Superior Court ruled that counsel retained by the Trustee properly represented JNC in Pima County Cause Nos. CR-28738 and CR-24054 and that JNC's privately retained counsel was not properly before the court. This special action followed.

ISSUE

The sole issue before this court is whether a corporation that is a defendant in a state criminal proceeding and a debtor in a bankruptcy proceeding has the right to retain counsel of its own choosing in the criminal proceeding or whether it must accept counsel chosen by the trustee in bankruptcy and the trustee's decision to plea bargain. We conclude that the corporation's federal and state

constitutional rights to counsel and to a jury trial are violated by compelling the corporation to accept counsel selected by the bankruptcy trustee and the trustee's decision to waive the right to a jury trial.

CONSTITUTIONAL RIGHTS

Where, as here, a corporation is subject to criminal prosecution, it is guaranteed a right to counsel by the Sixth Amendment to the United States Constitution. See United States v. Thevis, 665 F.2d 616, 645 n. 35 (5th Cir.1982) and United States v. Rad-O-Lite of Phiiadelphia, Inc., 612 F.2d 740 (3rd Cir.1979), and article II, s 24 of the Arizona constitution. "Due process of law, as it is expressed through the right-to-counsel provisions of the state and federal constitutions, comprehends a right to appear and defend with retained counsel of one's own choice." Pipkins v. Helm, 132 Ariz. 237, 239, 644 P.2d 1323, 1325 (App.1982). As a criminal defendant, JNC also has the right to a jury trial. U.S. Const. amend. VI; U.S. Const. art. III, s 2, cl. 3; Ariz. Const. art. II, ss 23 and 24.

DUTIES AND POWERS OF BANKRUPTCY TRUSTEE

The real parties in interest, the State of Arizona and the Trustee, insist that the Trustee properly represents JNC in both the bankruptcy and criminal proceedings. The authority for this broad power over the debtor corporation, they contend, is provided by the Code, the bankruptcy rules and applicable law.

a. Trustee's responsibilities re: the estate.

When a bankruptcy proceeding is commenced, all corporate property passes to the bankruptcy estate and the estate is represented by the trustee. 11 U.S.C. ss 323, 541. The trustee is accountable for that property and has the duty to maximize the estate. 11 U.S.C. s 704(1), (2). The trustee must investigate the debtor's financial affairs, 11 U.S.C. ss 704(4), 1106(a)(3), and may sue the officers, directors and other insiders on behalf of the estate to recover

fraudulent or preferential transfers of the debtor's property. 11 U.S.C. ss 547(b)(4)(B), 548. Clearly, the trustee has broad powers in dealing with matters that relate to the estate, including the power to actively litigate matters outside bankruptcy court which have an impact upon the estate.

b. Estate distinguishable from debtor.

The estate created by the filing of a bankruptcy petition "is an entity distinct from the debtor." 8A C.J.S. Bankruptcy s 105 at 104 (1988). Not everything that belongs to the debtor becomes part of the bankruptcy estate over which the trustee has control. "The estate generally includes all legal or equitable interests of the debtor in property as of the commencement of the case...." Id., citing In re Larson, 56 B.R. 154 (Bkrtcy.D.Mont.1985); see also 11 U.S.C. s 541(a)(1). We find nothing in the bankruptcy code or case law to support the conclusion that once a bankruptcy proceeding is commenced, the debtor's constitutional rights pass through to the estate along with the property and property rights that are traditionally considered part of the estate.

"The trustee has standing only to represent the interests of the estate." 8A C.J.S. Bankruptcy s 28 at 45. Indeed, s 323(a) of the Code, relied upon by the state and the Trustee, provides that the trustee "is the representative of the estate...." 11 U.S.C. s 323(a) (emphasis added). The Code does not purport to designate the trustee as the representative of the debtor. Accordingly, we do not believe that s 327 authorizes the trustee to retain counsel against the debtor's will to represent the debtor in a criminal proceeding in which the debtor, not the estate, is a defendant.

c. Trustee's power to retain professionals.

Section 327(a) gives the trustee the power to retain professionals "to represent or assist the trustee in carrying out the trustee's duties under [the Code]." Those duties, as described generally in s 323 and more specifically throughout the Code, relate directly to the management and preservation of the estate. Similarly, such professionals may be retained if already employed by the debtor and "necessary in the operation of [the debtor's] business," 11 U.S.C.

s 327(b), and where it is in the estate's best interests. s 327(d), (e). Section 327 has been construed to allow the court to appoint counsel to represent the debtor in a criminal proceeding where the debtor is requesting such appointment and demonstrates that the representation will be beneficial to the estate. See The Official Comm. of Disputed Litig. Creditors v. McDonald Invs., Inc., 42 B.R. 981 (N.D.Tex.1984); In re Duque, 33 B.R. 199 (Bkrtcy.S.D.Fla.1983); but see In re Delk, 27 B.R. 86 (Bkrtcy.W.D.Okla.1983) (appointment of counsel to defend debtor against indictment and use of estate funds to pay counsel do not relate to duties under the Code and are not authorized under s 327(a)); In re Pajarito Am. Indian Art, Inc., 11 B.R. 807 (Bkrtcy.D.Ariz.1981) (estate funds cannot be used to pay debtor's criminal defense counsel). Section 327, contrary to the contention of the state and the Trustee, does not authorize the bankruptcy trustee to compel the debtor to be represented in a criminal prosecution by counsel of the trustee's choosing over the debtor's objection, nor does it authorize the trustee to waive the criminal defendant debtor's right to a jury trial.

d. Bankruptcy Rule 6009.

The state and the Trustee argue that Bankruptcy Rule 6009, 11 U.S.C., provides additional support for the Trustee's representation of JNC in the state criminal proceedings. The rule states:

> With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

The rule is inapplicable, even assuming state criminal proceedings against the debtor were intended to be within its purview. The rule allows the trustee to defend actions pending at the time the bankruptcy proceeding is commenced. The proceeding below was commenced at least one year after the bankruptcy action. Moreover, the rule must be construed in harmony with the Code. The capacity to sue or be sued under s 323(b) "is a logical adjunct to the duties to be performed by the trustee and to the authority vested in him by Bankruptcy Rule 6009." 2 Collier on Bankr., s 323.02 at 323-4 (15th ed. 1990)

(footnote omitted). As such, we conclude that it allows the trustee to prosecute and defend actions that impact upon the trustee's duties in managing the estate, again recognizing the separate roles of the debtor and the debtor's estate.

c. Weintraub inapplicable.

The state and the Trustee contend that Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985), also supports their position. Weintraub, however, is distinguishable because it involved the trustee's ability to waive the corporate debtor's attorney-client privilege during an investigation by the Commodity Futures Trading Commission for purposes of discovering information from corporate counsel regarding the conduct of the corporation's prior managers; it did not involve the trustee's waiver of the corporation's constitutional rights. Although Congress, in its plenary power, may abrogate certain state laws, U.S. Const. art. I, s 8, cl. 4, it may not do so in violation of constitutional rights. See, e.g., Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589-90, 55 S.Ct. 854, 863-64, 79 L.Ed. 1593, 1604-05 (1935); In re Penn Cent. Transp. Co., 494 F.2d 270, 278 (3rd Cir.1974); United States v. Rome, 414 F.Supp. 517, 519 (D.Mass.1976).

Applying a balancing test, the Weintraub Court held that allowing the trustee to waive the attorney-client privilege as to the pre-bankruptcy communications of a corporate debtor did not impair a federal interest and that certain bankruptcy goals would be frustrated if the privilege could not be waived, including the trustee's power and obligation to investigate prior management to uncover and assert

causes of action against them. In Weintraub, the Supreme Court focused on the fact that the trustee's functions in a bankruptcy proceeding "are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors." 471 U.S. at 356, 105 S.Ct. at 1995, 85 L.Ed.2d at 383. It is the trustee that may continue operating the business. For that purpose, the pre-bankruptcy managers are "completely ousted." 471 U.S. at 352-53, 105 S.Ct. at 1993, 85 L.Ed.2d at 381.

While the Supreme Court stated that a bankruptcy trustee has broad control over the debtor, it was in the context of the management of the corporation and in the exercise of duties provided by the Code. We find no indication that Weintraub extends this control to a criminal proceeding against the debtor, or that Weintraub authorizes the trustee to exercise his/her power over the estate at the expense of the debtor's constitutional rights.

CONFLICT OF INTEREST

In addition to the fact that the trial court's order violates JNC's right to retained counsel of its own choice, Pipkins v. Helm, supra, the Trustee, who owes a fiduciary duty to the creditors, see In re O.P.M. Leasing Servs., Inc., 28 B.R. 740 (Bkrtcy.S.D.N.Y.1983), and whose primary responsibility is to preserve the estate, has a conflict of interest that counsel retained by the corporation would not have. Indeed, JNC's admission of wrongdoing purportedly could be used as a basis for rescinding investor promissory notes, rather than forgiving them, thereby avoiding the tax burdens to such investors of having to recognize ordinary income. Additionally, the Trustee concedes in its response that the plea negotiations were conducted based upon a cost/benefit analysis of the risks involved in not accepting a plea offer, "a business decision made by the Trustee in conjunction with his duties." The Trustee admits his eagerness to accept the state's plea offer because JNC would only be fined $100, without discussion of whether the corporation, through the acts of its directors and/or shareholders, would likely be convicted of the crimes charged based upon the anticipated evidence and whether JNC, the actual defendant, had chosen to waive its right to a jury trial. Thus, the Trustee reasons, JNC's guilty plea would avoid the risk of extensive fines and potential forfeitures which would diminish the

bankruptcy estate. Additionally, the Trustee claims, a guilty plea by JNC would enable the estate to avoid the incurrence of substantial legal fees. But see In re Pajarito Am. Indian Art, Inc., supra.[1]

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[1] Although the extent to which the resolution of the criminal proceeding might impact upon JNC's bankruptcy is not material to our decision, we note that the Trustee misperceives the likely import of this court's decision. The Trustee cites no authority in support of its concerns. First, although jurisdictions are split on this issue, an Arizona bankruptcy court has held that estate funds may not be used to pay a debtor's criminal defense counsel. In re Pajarito Am. Indian Art, Inc., supra. Second, with regard to any forfeitures of property, there are a multitude of protections for the creditors, including the following: (1) the argument that the property is now estate property under s 541(A)(1) of the Code which includes "all legal or equitable interests of the debtor in property as of the commencement of the case"; (2) any forfeiture proceeding by the state is subject to the automatic stay provision of s 362(a), see Sachs v. Ryan, 15 B.R. 514 (Bkrtcy.D.Md.1981) and Sachs v. Ryan, 32 B.R. 794 (Bkrtcy.D.Md.1983); and (3) to the extent a forfeiture claim could be presented as a claim against the estate, it would be subject to the priority provisions of s 507 of the Code, see also s 726(a) (order of distribution in the event JNC converts the proceeding to one under Chapter 7 of the Code). As a consequence, any forfeiture would be satisfied after unsecured creditors, with any deficiency remaining nondischargeable. Cf. Sachs v. Ryan, supra, 15 B.R. 514. Finally, with regard to the Trustee's concerns that penalties and fines would deplete the estate, the reorganization plan submitted by the Trustee pursuant to s 1123 of the Code and which may be influenced by creditors, 11 U.S.C. s 1103(c)(3), will presumably assure that such payments are made after unsecured creditors have been compensated. Moreover, in the event the proceeding is converted to a Chapter 7 proceeding, there is ample support for the proposition that such claims would be disallowed. See Simonson v. Granquist, 369 U.S. 38, 82 S.Ct. 537, 7 L.Ed.2d 557 (1962); In re Diversa-Graphics, Inc., 8 Collier Bankr.Cas. 59 (S.D.N.Y.1976).

Although financial considerations appropriately dictate the Trustee's preference of alternatives, it is for this very reason that the Trustee should not control JNC's defense in the criminal prosecution. The mere fact that JNC filed a bankruptcy petition does not mean that the only counsel to which it is entitled in a criminal proceeding is one who makes decisions from purely a business perspective and based upon how to resolve the criminal matter so as to maximize the benefit to creditors. Nor does it mean that JNC must relinquish its right to a jury trial simply because the Trustee considers it a sound business decision and in the estate's best interests. When a criminal defendant is offered a plea agreement, many factors are relevant to the defendant's decision. The financial impact of proceeding to trial is but one factor to be considered. Others include the opportunity to vindicate one's name, disprove inaccurate allegations, and the likelihood of conviction. Clearly, the decision to waive the right to jury trial in a criminal proceeding is the defendant's right, not the trustee's. As this state's constitution provides, "[t]he right of trial by jury shall remain inviolate." Ariz. Const. art. II, s 23.

BANKRUPTCY COURT AUTHORIZATION OF REPRESENTATIVE

The bankruptcy court authorized the Trustee to negotiate the plea agreement on behalf of JNC. Because JNC, as opposed to its estate in bankruptcy, is the party to the criminal action and in light of our conclusions regarding the limitations on the Trustee's powers and duties, the bankruptcy court was without jurisdiction to decide who would represent JNC in the state criminal proceedings and could not authorize the Trustee to waive JNC's right to a jury trial. In Younger v. Harris, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669, 675 (1971), the Supreme Court stated:

> Since the beginning of the country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

This policy applies equally where the federal court is acting under the Code. In re Diversa-Graphics, Inc., 8 Collier Bankr.Cas. 59, 63 (S.D.N.Y.1976); see also In re Trial West, Inc., 17 B.R. 330 (Bkrtcy.D.S.D.1982).

It is clear that Congress particularly intended to preclude federal bankruptcy courts from interfering with state criminal proceedings. For example, criminal proceedings against the debtor are excepted from the automatic stay provision of s 362(a). 11 U.S.C. s 362(b)(1); see also In re M. Frenville Co., Inc., 744 F.2d 332 (3d Cir.1984), cert. denied, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985); Trail West, Inc., supra; 2 Collier on Bankr. 362.05 [1].

For the reasons set forth above, the bankruptcy court's action is not dispositive of the issue before us.

CONCLUSION

We conclude that the right to counsel and the right to a jury trial under the Sixth Amendment to the United States Constitution and article II, s 24 of the Arizona Constitution must remain inviolate notwithstanding the fact that a defendant is also debtor in a bankruptcy proceeding. Because JNC's federal and state constitutional rights are violated by the trial court's order, the order is vacated, and this matter is remanded for further proceedings consistent with this decision.

/s/
JOHN M. ROLL, Presiding Judge

CONCURRING:

/S/
MICHAEL A. LACAGNINA, Judge

/s/
JAMES D. HATHAWAY, Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
SEP 29 1992
OFFICE OF THE CLERK

No. 92-441

In The

Supreme Court of the United States

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,

Petitioners,

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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II. DID THE DISTRICT COURT HAVE JURISDICTION TO DISMISS PETITIONER'S LAWSUIT PURSUANT TO FED. R. CIV. P. RULES 8(a), 8(e), 21 AND 41(b)?

Statement of Jurisdiction: The Petition For Writ of Certiorari is untimely.

On February 25, 1992, the United States District Court for the District of Arizona dismissed with prejudice petitioners' Complaint when the petitioners willfully refused to obey an order of the Court. On March 2, 1992, the Ninth Circuit Court of Appeals affirmed the Order dismissing the Complaint. On April 27, 1992, the Ninth Circuit Court of Appeals denied the petitioners' Petition for Rehearing.

On or about September 1, 1992, petitioners filed a Petition for Writ of Certiorari in the United States Supreme Court.

Petitioners had ninety days from the denial of their Motion for Rehearing on April 27, 1992, to file their Petition for Writ of Certiorari. The ninetieth day expired on or about July 27, 1992. Petitioners filed their pleading with this Court on or about September 1, 1992, approximately thirty-seven days later.

The ninety (90) day time requirement imposed by 28 U.S.C. § 2101(c) and Rule 13.1 of the United States

Supreme Court for filing such a writ are extended only upon order of the Supreme Court or the filing of a timely motion for rehearing. The ninety (90) day period is not tolled until a mandate is entered. See, Rule 13.4, United States Supreme Court; *Comm'n v. Bedford's Estate*, 65 S.Ct. 1157, 1159, 325 U.S. 283, (1945). Petitioners' writ should be summarily dismissed as untimely unless the issues are limited *only* to the question of the imposition of sanctions by the United States Ninth Circuit Court of Appeals pursuart to its Order of June 12, 1992. *Missouri v. Jenkins*, 110 S.C:. 1651, 109 L.Ed.2d 31 (1990), *F.C.C. v. League of Women Voters*, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984).

Statement of the Case

The county respondents moved to dismiss on the basis of Rule 8(a) on June 15, 1990, and were joined by the state respondents on June 19, 1990. The county respondents and Respondent Beren joined the Boswell/Streich Lang Motion Pursuant to Rules 8 and 41 respectively on February 5, 1991, and February 8, 1991.

The original complaint, made up of 374 pages and approximately 1,875 pages of exhibits, was filed on May 23, 1990, in an effort to enjoin ongoing state court criminal prceedings. Without designating it as such, Jenkins[1] requested leave to amend the pleadings by inserting four lines in a 14 page Motion for Reconsideration filed on July 30, 1990. The District Court granted the request by way of a minute order dated September 7, 1990. Jenkins

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[1] "Jenkins" or "the plaintiff" will be used collectively to refer to the petitioners.

was allowed 20 days to produce the amended pleadings, but on the 20th day, he requested an extension, which the Court granted, allowing until October 19, 1990, to correct the pleadings.

Jenkins again requested an extension on October 18, 1990, which the Court granted on November 14, 1990, giving him until December 17, 1990, to produce the First Amended Complaint ("FAC"). On December 18, 1990, Jenkins filed yet another request for an extension of time, which the Court granted on December 19, 1990, allowing Jenkins until December 21, 1990. Counsel for petitioner was then warned that all future pleadings and briefs would conform to local rules absent *"extraordinary* good cause".

The FAC, which was filed on December 21, 1990, consisted of 422 pages, with about 2,700 pages of exhibits, in total standing 11 inches tall. On January 31, 1991, the respondents Boswell and Streich Lang moved to dismiss the FAC on the basis of Rules 8(a)(2) and(e), Rule 41(b) and Rule 21. The District Court dismissed the FAC with prejudice on February 7, 1991, citing violations of Rules 8(a), 8(e) and 41(b). The dismissal operated as an adjudication on the merits. In its order of dismissal, the Court gave the petitioner 10 days to file an amended complaint containing a maximum of 15 pages, or alternatively, the judgment would become final.

Instead of filing an amendment in keeping with the parameters set by the District Court, the petitioner filed, on February 22, 1991, a Motion for Reconsideration, which the District Court denied. Consistent with the

order of February 7, the case was dismissed with prejudice, and judgment was entered accordingly on February 25, 1991. The petitioner filed a Notice of Appeal on February 26, 1991.

On May 10, 1991, the District Court declined to entertain a motion to vacate the original judgment, stating that the matter would be left to the United States Ninth Circuit Court of Appeals. On June 7, 1991, Jenkins filed a motion for leave to include an additional issue on appeal, along with a motion for leave to expand the record on appeal, in order to argue against the existence of federal subject matter jurisdiction.

On March 2, 1992, the Ninth Circuit issued its Memorandum Decision holding (i) that the District Court had subject matter jurisdiction, (ii) that this Court's *Younger* mandate did not bar the District Court's dismissal with prejudice even though the District Court did not find that the state criminal proceedings had been undertaken in bad faith, to harass the petitioner or for other exceptional circumstances, and (iii) that petitioners' appeal was frivolous for the reason that the outcome of the appeal was clearly apparent. On April 27, 1992, the Ninth Circuit denied petitioners' Petition for Rehearing En Banc. On June 12, 1992, the Ninth Circuit awarded attorney's fees on appeal to some of the respondents.

Argument

I. DISMISSAL OF THIS CASE PURSUANT TO RULES 8(a) and (e), 21 AND 41(b) OF THE FED. R. CIV. P. DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

A. Standard of Review

A decision to dismiss an action pursuant to Rule 41(b), Fed. R. Civ. P., will not be overturned on appeal unless it is apparent that the district court abused its discretion, and not until there is formed the definite and firm conviction that the district court committed clear error. *Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir. 1980); *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671, 674 (9th Cir. 1981). The District Court dismissed this case on the basis of Rules 8(a)(e), 41(b) and Rule 21, Fed. R. Civ. P. In reviewing a district court's decision to dismiss, the court of appeals may affirm on any ground supported by the record. *Hatch v. Reliance Insurance Company*, 758 F.2d 409 (9th Cir. 1985).

While it is true that the subject matter jurisdiction of the District Court is a question of law and is reviewable *de novo* by the Court of Appeals, *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986), contrary to the petitioner's wishes, this appeal is legitimately neither a *Younger* case (*Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)), nor a jurisdiction case.

B. Discretion to Dismiss on the Basis of Rules 8(a) and (e)

The original complaint filed by the petitioner in this action is 373 pages long, along with an additional 1,875 pages of exhibits. The petitioner's FAC is 422 pages in length, with approximately 2,300 pages of exhibits. When it is considered that Rule 8(a), Fed. R. Civ. P., requires a "short plain statement of the claim showing that the pleader is entitled to relief," and that Rule 8(e) requires that such pleading contain "simple, concise, and direct" averments, it becomes obvious that the petitioner's complaint violated these requirements. Additionally, a review of the case law concerning the requirements imposed by Rules 8(a) and 8(e), Fed. R. Civ. P., indicates that the federal courts have thrown out the complaints of litigants whose transgressions against these rules were much less significant than those demonstrated by the petitioner. *E.g., Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671 (9th Cir. 1981), holding that an amended complaint consisting of 23 pages along with 24 pages of addenda violated Rules 8(a) and 8(e), justifying dismissal pursuant to Rule 41(b), Fed. R. Civ. P.

What is really striking about these cases, however – aside from the fact that they indicate that the discretion of the trial court to enforce the rules is routinely upheld – is that none of the examples come even close to matching the magnitude of the abuse of the rules which has been demonstrated by the petitioners in this case. One must really wonder at the gall of a litigant who drafts a "short plain statement of a claim" that has to be carried and served in a carton box.

Although it cannot seriously be suggested that the district court abused its discretion in determining that the petitioner's gigantic, repetitious, prolix, and confusing complaint violated Rule 8, the petitioner nevertheless offers up a series of unconvincing excuses for such behavior. For example, Jenkins contends that under the brevity requirements of 8(e)(1) each individual count of a complaint should be tested for simplicity and brevity, rather than by looking at the entire complaint as a whole. *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956). This argument cannot excuse the sheer size of the FAC. The complaint contains approximately 50 causes of action, or an average of 54 pages per cause. Even if taken separately, the length of each count requires dismissal. Moreover, considering the manner in which Jenkins repeatedly inter-incorporated counts, parties and allegations, the sincerity of his argument about viewing the counts individually would seem questionable.

Jenkins contends that *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 96 L.Ed.2d 222 (1962), stands for the principle that the federal rules should be construed to secure the just, speedy and inexpensive determination of every action. *See*, 371 U.S. at 181-182, 83 S.Ct. at 230. With pleadings of this magnitude, there is little chance of an expedited conclusion should the petitioner's pleadings be allowed. To accept this pleading at its present length is not in accordance with sound judicial policy, and to do so is to invite future litigants to completely ignore the federal rules as the governing principles of procedure in federal courts. The petitioner's FAC also creates substantial and unnecessary work and expense for all parties and for the Court.

Jenkins complains that the Court led him to believe that it would accept a FAC longer than the original complaint, because the petitioner had claimed discovery of additional information. He argues that he should have earlier been alerted to the District Court's concerns about length since the issue had been raised by the respondents. This argument misses the point. First, as discussed further below, Jenkins had access to the prior motion regarding Rule 8 violations, and the Court had no obligation to warn the petitioner about relevant case law related to Rule 8. Second, the Court's Order of February 7, 1991, even allowed Jenkins 10 days to amend the FAC and informed him that the amended pleading could not exceed 15 pages. In response, the petitioner chose to do nothing. Jenkins' claim of lack of notice is, therefore, frivolous.

C. Propriety of Dismissal Under Rule 41(b)

Rule 41(b) of the Federal Rules of Civil Procedure reads in applicable part as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

While the remedy of dismissal with prejudice for failure to follow a court's rule or order is harsh, such an action by the court is appropriate in aggravated circumstances, as occurred at the trial level in this case. *Von*

Poppenheim v. Portland Boxing Comm., 442 F.2d 1047 (9th Cir. 1971), 15 A.L.R. Fed 396, *cert. den.* 404 U.S. 1039, *reh. den.* 405 U.S. 999. All that is required of the judge is that possible and meaningful alternatives be reasonably explored. *Id. See also, Nevijel, supra* at 674. Although sanctions short of a dismissal under Rule 41(b) are available in the event of a plaintiff's failure to comply with a trial judge's order, the judge need not exhaust them before dismissing the case. *Nevijel, supra* at 674.

Petitioners posture is premised in part on an assertion that the petitioners were taken by surprise and not properly forewarned that the Court's patience with their abuses might eventually run out. Contained in the Statement of the Case are the many instances in which the District Court gave Jenkins and his counsel opportunities to produce proper pleadings. No authority is available which would support the proposition that the District Court was required to play the parent for Jenkins and his counsel in the manner that they appear to be demanding, that is, for the Court to provide warning of matters that are clearly embraced by the concept of common sense.

Since the Court did not explicitly warn Jenkins and his counsel *not* to do so, the petitioner *expanded* the complaint with meaningless and frivolous changes, and the addition of a host of new defendants in violation of Rule 21. Given an additional opportunity to amend, Jenkins and his counsel simply chose not to. Neither naivete nor unfair surprise are credible excuses for the form in which this suit was filed and the way in which it was subsequently managed.

In the event that common sense and a cursory reading of the rules of court really did leave Jenkins and his counsel without an awareness that such maneuvering was inappropriate, they might have read the cases and rules cited in various objections and motions to dismiss which were filed by the respondents, the first of which was a Rule 8 motion filed by the county contemporaneously with the answer. Among the cases cited were: *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985); *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671 (9th Cir. 1981); *Schmidt v. Herrman*, 614 F.2d 1221 (9th Cir. 1980); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); and *Carrigan v. California State Legislature*, 263 F.2d 560 (9th Cir. 1959), cert. denied, 359 U.S. 980.

The Court was completely justified in dismissing this claim with prejudice under the circumstances. An ample body of law, clearly applicable to these pleadings, and to the possibility of dismissal with prejudice for failure to correct such pleadings, was brought to the attention of the petitioner early in this case, and was reasserted throughout the District Court proceedings.

D. Violation of Rule 21

Jenkins' violation of Rule 21 of the Federal Rules of Civil Procedure, as against the undersigned respondent, was but an offense upon offenses in terms of rule violations. The tactic was yet another reason why the Court was justified in dismissing this case with prejudice for failure to follow the rules.

II. THE DISTRICT COURT HAD JURISDICTION TO DISMISS PETITIONER'S LAWSUIT PURSUANT TO FED. R. CIV. P. RULES 8(a), 8(e), 21 and 41(b).

A. Irrelevancy of Younger on Appeal

The petitioner's argument that the District Court lacked jurisdiction to dismiss this suit is – at first glance – confusing, and – after scrutiny – a *non sequitur*. The petitioner has conjured up the notion that the federal court, faced with an argument of an exception to the *Younger* abstention doctrine, can only exercise jurisdiction if it rules in his favor. By this reasoning, the District Court has no jurisdiction over Jenkins' cause of action yet, because jurisdiction sufficient to dismiss the action is only conferred upon the District Court *after* the Court has made a finding of bad faith or harassment in the state court criminal prosecutions. Petitioner asserts that the District Court has no jurisdiction until such time as it determines that intervention is appropriate, and that therefore the Court's sanction of dismissal prior to such intervention is void *ab initio* due the "total want of jurisdiction". Petitioner's argument is illogical, incorrect, and in conflict with the legal concepts embodied in the term "jurisdiction."

The legal concept of a court's jurisdiction deals with the basic power and authority to act at all, rather than the manner in which a court should act if it has such power. "The jurisdiction of the federal courts – their power to adjudicate – is a grant of authority to them by Congress . . . " *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 167, 60 S.Ct. 153, 154, 84 L.Ed. 167 (1939). "When concerned . . . with the power of the . . . federal

courts to entertain litigation . . . 'jurisdiction' means the kinds of issues which give right of entrance to federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950). In the case at bar, the District Court was given jurisdiction over the petitioner's complaint by virtue of the Congressional grant of authority found under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights), based upon alleged claims under 42 U.S.C. § 1983 and 18 U.S.C. § 1964. Indeed, the petitioner *invoked the jurisdiction of the District Court upon filing the complaint with the Court.* Having conferred this power to decide the claims by virtue of filing the complaint, the petitioner now argues that the District Court had no power to dismiss the claims!

The following discussion by the Supreme Court illuminates the fact that the acquisition of jurisdiction by a federal court over a case brought before it, is quite a distinct issue from the manner in which the court should deal with the matter that it has been called upon to adjudicate.

> [T]he question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserts a cause of action under the . . . Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative.

> If the complaint raises a federal question, *the mere claim confers power to decide that it has no merit*, as well as to decide that it has. In the words of Mr. Justice Holmes," * * * if the plaintiff really makes a substantial claim under an act of Congress *there is jurisdiction* whether the claim ultimately be held good or bad." . . . Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature . . .

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951). [Citations omitted, emphasis added.]

It is therefore clear the District Court was given the jurisdiction to adjudicate this matter by Congress, which includes the right to decide the case against the petitioner who brought the case before the Court, and, this grant of jurisdiction was not dependent upon any subsequent determination by the Court – *e.g.*, a perceived authority to intervene under *Younger v. Harris, supra.* "The jurisdiction of the court can never depend upon its decision upon the merits of the cause brought before it, but upon its right to hear and decide it at all." *Ex parte Watkins*, 32 U.S. 568, 572, 7 Pet. 568, 572, 8 L.Ed. 786 (1833). Before the petitioner would have been entitled to obtain the relief requested, it would have been necessary to first prevail on the issue of whether an exception to the *Younger* abstention doctrine was present. This necessity would permit the federal court to proceed and adjudicate the petitioner's claims, which admittedly involve types of issues over which the district court has subject matter jurisdiction. The *Younger* abstention doctrine itself, however, is not a jurisdictional matter:

> [N]ot abstaining in a case where abstention would be proper would not deprive a federal court of its subject matter jurisdiction – *abstention presupposes jurisdiction* . . .

Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir. 1984). [Emphasis added.]

This conclusion is also mandated by the Supreme Court's determination in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). In *Sosna*, the Court indicated that it had requested that the parties address themselves to the issue of whether *Younger v. Harris* should affect whether or not the District Court or the Supreme Court should reach the merits of the constitutional issue, and, after being urged by the parties to reach the merits, the Court decided to rule upon the constitutional issue presented. *Sosna v. Iowa*, 95 S.Ct. at 556 n. 3. Since it is well settled that "mere agreement of the parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case," *People's Bank v. Calhoun*, 102 U.S. 256, 260-61, 26 L.Ed. 101 (1880), it is apparent the *Younger* abstention is not jurisdictional, and any failure to abstain pursuant to *Younger* would not result in any extra-jurisdictional act by the District Court. Petitioner's arguments, asserting that the judgment of dismissal of the District Court is void *ab initio* for lack of jurisdiction, are baseless and wrong.

Contrary to the petitioner's suggestion, there is nothing in either *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1985), or *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079 (9th Cir. 1987), indicating that *Younger* abstention is a jurisdictional matter. To the extent that comments about the relationship between comity and abstention in the

concurring opinion in *World Famous*, 820 F.2d at 1084, can reasonably be interpreted as implying the absence of jurisdiction, either the choice of words or the suggested interpretation of them is wrong, as earlier demonstrated.

Likewise, *Deakins v. Monaghan*, 484 U.S. 193, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988), contains nothing whatsoever which would reflect upon any supposed lack of jurisdiction of the District Court to decide the petitioner's case. *Deakins* is inapposite in that it dealt with *Younger* abstention issues, and it had nothing to do with the propriety of sanctioning litigants who violate the Federal Rules of Civil Procedure. The petitioner keeps forgetting – or, perhaps, keeps trying to get others to forget – that the District Court neither abstained nor proceeded in the case at bar. The issues in this case no longer include *Younger* abstention issues. This is a Rule 41(b) sanctions case. Since *Deakins* dealt with the federal court's duty to "retain jurisdiction over the claims *properly before it* . . . ," 108 S.Ct. at 527 (emphasis added), it is hard to imagine what relevance such a case would have to litigants, such as the petitioner, who have been thrown out of the federal court because of egregiously improper conduct and defiance of the court's own rules. It would be ironic indeed if the *Deakins* case – which serves to protect the rights of litigants attempting to place themselves under the lawful authority and protection of the federal courts – were perverted so as to prevent the court from throwing out wrongdoers and abusers of the federal court system such as the petitioner. If there is any legal authority for the unlikely proposition asserted by the petitioner that Rule 41(b), Fed. R. Civ. P. does not apply to this case, none has been provided.

Although the foregoing indicates that the District Court had the jurisdiction to determine the petitioner's case, it is not apparent that the District Court's jurisdiction over the subject matter of the petitioner's cause of action was even a necessary prerequisite to the efficacy of the Court's sanction of dismissal pursuant to Rule 41(b). This is true because the petitioner failed to follow the Federal Rules of Civil Procedure. At least in the Rule 11 context, "[t]he fact that the district court lacked jurisdiction to consider the merits of the case did not preclude it from imposing sanctions." *Orange Production Credit v. Frontline Ventures Ltd.*, 792 F.2d 797 (9th Cir. 1986).

Since the petitioners placed themselves before the District Court – and since they have dragged others before the same Court – they should reasonably be expected to follow the rules of the tribunal which they themselves invoked, and they should not now be heard to assert that such tribunal has no authority to act in a manner which negatively impacts upon them.

B. The Doctrine of Judicial Estoppel

The petitioner should be estopped from claiming that the District Court lacked jurisdiction in this case by the common law principle of judicial estoppel. The petitioner invoked the jurisdiction of the Court at the outset of this action and has repeatedly argued in the Court below that the *Younger* abstention doctrine should not apply, and that the Court should assert jurisdiction. Now that the District Court has asserted its jurisdiction, and dismissed Jenkins' case with prejudice, he argues that the Court should never have asserted jurisdiction in the first place.

The doctrine of judicial estoppel, as it has very recently been defined and applied by the United States Ninth Circuit Court of Appeals, should preclude the petitioner from asserting such an inconsistent legal assertion:

> As we explained in *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1989), '[t]he doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.' (Quoting *Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)). Although 'most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one,' *id.*, it applies more generally as well. In *Russell*, for example, we applied the discretionary estoppel doctrine to preclude inconsistent legal assertions.
>
> This case is ideally suited for the application of judicial estoppel. From the fact that we have estopped litigants from asserting mere *arguments* that are inconsistent with arguments on which they prevailed in the district court, it follows *a fortiori* that we will not allow a party to seek an *outcome* directly contrary to the result he sought and obtained in district court. Yet that is precisely what the [appellant] is attempting to do here. The [appellant] represented to the district court that he did not wish to be a party to this litigation, presented arguments in support of that position, and persuaded the district court to rule in his favor on that point. Only after the

> district court granted the [appellant's] request and then reached a result on the merits with which the [appellant] disagreed did [the appellant] decide that he would rather be a party after all. We will not accept such a reversal of position.

Yniguez v. State, No. 90-15546 (9th Cir., July 19, 1991), at 8979, 1991 U.S. App. LEXIS 15490, 32-33. The doctrine is intended to prevent litigants from playing "fast and loose with the court" by asserting inconsistent positions. *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988). The doctrine is intended to foster "the orderly administration of justice and . . . the dignity of judicial proceedings." *State of Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985). The doctrine is to be applied to prevent the perversion of the judicial process by discouraging intentional self-contradiction which has been used as a means of obtaining unfair advantage in a forum whose interest is justice. *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990).

The petitioners have invoked, asserted, and argued the jurisdiction of the District Court over their claim, have derived the benefit thereof and have required the respondents to appear and defend against the claim. Having done so, the petitioners should be precluded from taking the inconsistent legal position which they have taken subsequently, to wit, that the District Court does not have jurisdiction to decide the claim. Permitting petitioners – who have been found to have abused the other parties and the court with their flagrant violations of the

Federal Rules of Civil Procedure – to avoid the consequences of their own wrongdoing by now asserting that the court does not have the power to sanction them for lack of jurisdiction over them, would have an adverse impact on the judicial system. It would not be appropriate to permit the petitioners to use such self-contradiction to avoid the consequences of their iniquitous acts, nor to permit further abuse of the court or the respondents at the hand of petitioner. This case is ideally suited for the application of judicial estoppel. Jenkins' sudden change in position should not be permitted, and in the context of this case, the tactic should be sanctioned.

III. SANCTIONS AND FEES ON APPEAL: THE NINTH CIRCUIT EXERCISED PROPER DISCRETION REGARDING SANCTIONS ON APPEAL.

Neither petitioner nor his counsel can reasonably assert in good faith that the mass of repetitive paper which they deposited in the federal court was consistent with Rule 8. The conduct of the petitioner and his counsel in this case not only warranted dismissal by the District Court and the Court of Appeals, but also justified fees and sanctions at both levels. Because this case was brought primarily as a § 1983 action and is not only frivolous but brought for improper purposes, motions for fees and sanctions pursuant to Rule 11 and 42 U.S.C. § 1988 are presently pending before the District Court.

Jenkins' invocation of the *Younger* line of cases as an attack on the District Court's jurisdiction is spurious. *Younger* and its progeny dealt with federal court interference in state court proceedings by way of injunction.

Under Jenkins' logic, a federal court would never have jurisdiction, unless it was prepared to make a ruling that the *Younger* abstention does not apply. This line of thinking would put the petitioner in a "win-win" situation. The district court would be required to either intervene in the criminal proceeding or dismiss for want of jurisdiction. The court would thereby be divested of power to make a decision on the merits, and would, in effect, be forced to leave the petitioner free to deposit the same pleadings in state court. The application of *Younger* urged by Jenkins is not only illogical, but would amount to inviting every state court criminal defendant to seek federal intervention in his or her state court prosecution. Jenkins and his counsel expose, by the argument related to *Younger*, a desire to control the decision-making processes of the District Court in a highly inappropriate manner. Jenkins would wish, it would seem, to "corner" the District Court, *forcing* it to either accept jurisdiction, wade through massive, abusive pleadings and decide in his favor, or to not exercise jurisdiction.

Because neither issue raised on appeal had merit, the appeal was sanctioned properly under Rule 38, Fed. R. App. P. Under Rule 38; the Court of Appeals may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir. 1987).

Conclusion

For the reasons stated above, the undersigned request that the Court deny certiorari as sought by petitioners.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,
Petitioners,

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent Beren

October 5, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Was the district court within its discretion when it dismissed the petitioners First Amended Complaint based on violations of Rules 8(a), 21 and 41(b), Fed. R. Civ. P.?

2. Did the district court have jurisdiction to dismiss petitioners' lawsuit pursuant to Fed. F. Civ. P.?

3. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion when it determined that Petitioners' appeal to that court was frivolous and sanctioned Petitioners with double costs and awarded attorney's fees to some of the Respondents?

LIST OF PARTIES

The parties to the proceedings below and to this Petition were and are the petitioners David Randall Jenkins, Stacia Lee Sumwalt and The JNC Companies, an Arizona corporation, and the respondents Alan D. Davidon, individually and in his of ficial capacity as Deputy Pima County Attomey; Millard Rowlctte, individually and in his of ficial capacity as Deputy Pima County Attomey; Stephen D. Neely, in his official capacity as Pima County Attomey; Jerry Goddard, individually; Pima County, Arizona, a body politic and corporate; Greg Lunn, in his official capacity as Pima County Supervisor for District 1; Dan Ekstrom, in his official capacity as Pima County Supervisor for District 2; Ld Moore, in his official capacity as Pima County Supervisor for District 3; Reg Morrison, in his official capacity as Pima County Supervisor for District 4; Raul Grijalva, in his official capacity as Pima County Supervisor for District S; Lawrence Fleischman, individually and in his official capacity as judge of the Pima County Superior Court, Division 19; Bemardo P. Velasco, in his official capacity as judgc of the Pima County Superior Court, Division 11; Fred T. Boice, individually and in his of ficial capacity as trustee in bankruptcy; Peter David Beren, in dividually; Susan G. Boswell, individually; and Streich Lang, P.A., a professional law association.

Pursuant to Rule 29.1, of the Rules of the Supreme Court of the United States of Title 28, United States Code, Respondent Beren discloses the following list of wholly owned subsidiaries of The JNC Companies, an Arizona corporation:

JNC Realty Corporation
JNC Construction Resources Corporation
JNC Financing Consultants, Inc.
JNC Business Planning Corporation
JNC Development Corporation
JNC Information Systems, Inc.
Ventana Financial Corporation
JNC Agencies, Inc.
Rillito Concessions, Inc.
Rillito Operations, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,
Petitioners

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Peter Beren, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is attached as A-1 in the Appendix of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The original Complaint, made up of 374 pages and approximately 1875 pages of exhibits, was filed on May 23, 1990 in an effort to enjoin ongoing state court criminal proceedings. Without designating it as such, Petitioners requested leave to amend the

pleadings by inserting four lines in a 14 page Motion for Reconsideration filed on July 30, 1990. The district court granted the request by way of minute order dated September 7, 1990. Petitioners were allowed 20 days to make the amendment, and, after requesting an extension, were allowed until October 19, 1990 to correct the pleadings.

Petitioners again requested an extension on October 18, 1990, which the court granted on November 14, 1990, giving them until December 17, 1990 to produce the First Amended Complaint. On December 18, 1990, Petitioners filed yet another request for an extension of time, which the court granted on December 19, 1990, allowing Petitioners until December 21, 1990 to amend. Counsel for Petitioners was then warned that all future pleadings and briefs would conform to local rules absent "extraordinary good cause."

The First Amended Complaint, which was filed on December 21, 1990, consisted of 422 pages, with about 2700 pages of exhibits, in total standing 11 inches tall. On January 31, 1991, the Defendants below Boswell and Streich Lang, moved to dismiss the First Amended Complaint on the basis of Rules 8(a)(2) and (3), Rule 41(b) and Rule 21. The district court dismissed the First Amended Complaint with prejudice on February 7, 1991, citing violations of Rules 8(a), 8(e) and 41(b). The dismissal operated as an adjudication on the merits. In its order of dismissal, the court gave the Petitioners 10 days to file an amended complaint containing a maximum of 15 pages, or alternatively, the judgment would become final.

Instead of filing an amendment in keeping with the parameters set by the district court, the Petitioners filed, on February 22, 1991, a Motion for Reconsideration, which the district court denied. Consistent with the order of February 7, 1991, the case was dismissed with prejudice, and judgment was entered accordingly on February 25, 1991. The Petitioners filed a notice of appeal on February 26, 1991. On March 2, 1992, the Ninth Circuit issued its Memorandum Decision holding that the district court had subject matter jurisdiction, that this Court's Younger v. Harris, 401 U.S. 37 (1971), mandate did not bar the district court's dismissal with

prejudice, and Petitioners' appeal was frivolous for the reason that the outcome of the appeal was clearly apparent and awarded double costs against the Petitioners. On April 27, 1992, the Ninth Circuit denied Petitioners Petition for Rehearing En Banc.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The petition is untimely.

The Petitioners' Petition for Rehearing En Banc of the decision they wish to appeal was denied on April 27, 1992. The Petition for Review by this Court was filed on September 1, 1992, more than ninety days since the denial of Rehearing En Banc by the Court of Appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101(c) and Rule 20 of this Court). The only action taken by the Ninth Circuit after April 27, 1992 was an award of attorney's fees to some of the Respondents on June 12, 1992. The award of attorney's fees did not change the judgment, and in any event Respondent Beren was not affected by this award of fees.

The awarding of fees was a post-judgment matter falling in the area of costs. Even if viewed otherwise, this Court decided in Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952) that a substantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for seeking review of the unchanged portion. This Respondent did not receive the attorney fees awarded. The award of attorney's fees has no relevance to the litigation between Respondent Beren and the Petitioners. Therefore, Petitioners' application for writ of certiorari is untimely and should be denied with respect to all issues relevant to this Respondent.

II.

The issues raised in the petition are not important enough to warrant granting a writ of certiorari.

Petitioners do not even attempt to explain why the issues in this case are important enough to warrant review by this Court. This case involves a sanction for an abuse of the Federal Rules of Civil Procedure, and turns on facts unique to this litigation and not likely to be repeated. The Ninth Circuit Court of Appeals found the appeal to be so lacking in merit as to be frivolous. There is no conflict of decisions, and the issues at stake here matter little to anyone other than the parties to this litigation. The questions raised by the Petitioners do not warrant review.

III.

The court below fully considered and corrected decided the issues.

A. Dismissal of this Case Pursuant to Rules 8(a) and (e), 21 and 41(b) of the Fed. R. Civ. P. did not Constitute an Abuse of Discretion.

1. Standard of Review

A decision to dismiss an action pursuant to Rule 41(b), Fed. R. Civ. P., will not be overturned on appeal unless it is apparent that the district court abused its discretion, and not until there is formed the definite and firm conviction that the district court committed clear error. Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980); Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981). The district court dismissed this case on the basis of Rules 8(a), 8(e), 41(b) and Rule 21, Fed. F. Civ. P. In reviewing a district court's decision to dismiss, the court of appeals may affirm on any ground supported by the record. Hatch v. Reliance Insurance, 758 F.2d 409 (9th Cir. 1985).

2. Discretion to Dismiss on the Basis of Rules 8(a) and (e).

The original Complaint filed by the Petitioners in this action

is 373 pages long, along with an additional 1,875 pages of exhibits. The Petitioners' First Amended Complaint is 422 pages in length, with approximately 2800 pages of exhibits. Rule 8(a), Fed. F. Civ. P., requires a "short plain statement of the claim showing that the pleader is entitled to relief," and Rule 8(e) requires that such pleading contain "simple, concise, and direct" averments. The Petitioners' Complaint violated these requirements. Additionally, a review of the case law concerning the requirements imposed by Rules 8(a) and 8(e), Fed. F. Civ.P., indicates that the federal courts have thrown out the complaints of litigants whose transgressions against these rules were much less significant than those demonstrated by the petitioners. For instance, the court in Nevijel held that an amended complaint consisting of 23 pages along with 24 pages of addenda violated Rules 8(a) and 8(e), justifying dismissal pursuant to Rule 41(b), Fed. R. Civ. P. See also, the cases cited in the Ninth Circuit's Memorandum opinion.

These cases all indicate that the discretion of the trial court to enforce the rules is routinely upheld. More striking, however, is that none of the facts in these cases come even close to matching the magnitude of the abuse of the rules which has been demonstrated by the Petitioners in this case. It is unlikely that a pleading that has to be carried and served in a carton box qualifies as a short and plain statement of a claim.

Although it cannot seriously be suggested that the district court abused its discretion in determining that the Petitioners' gigantic, repetitious, prolix, and confusing Complaint violated Rule 8, the Petitioners nevertheless offer up a series of unconvincing excuses for such behavior. For example, Petitioners contend that under the brevity requirements of 8(e)(1) each individual count of a complaint should be tested for simplicity and brevity, rather than by looking at the entire complaint as a whole. This argument cannot excuse the sheer size of the First Amended Complaint. The First Amended Complaint contains approximately 50 causes of action, or an average of 54 pages per cause. Even if taken separately, the length of each count requires dismissal. Moreover, considering the manner in which Petitioners repeatedly interincorporated counts,

parties and allegations, the sincerity of their argument about viewing the counts individually is questionable.

Petitioners contend that Foman v. Davis, 371 U.S. 178 (1962), stands for the principle that the federal rules should be construed to secure the just, speedy and inexpensive determination of every action. Foman, 371 U.S. at 181-182. With pleadings of this magnitude, there was little chance of an expedited conclusion had the Petitioners' pleadings been allowed. To have accepted this pleading at its present length would not have been in accordance with sound judicial policy, and to have done so, would have invited future litigants to completely ignore the federal rules as the governing principles of procedure in federal courts. The Petitioners' First Amended Complaint also created substantial and unnecessary work and expense for all parties and the court.

Petitioners complain that the court led them to believe that it would accept a First Amended Complaint longer than the original Complaint, because the Petitioners had claimed discovery of additional information. They argue that they should have earlier been alerted to the district court's concerns about length since the issue had been raised by the Respondents. This argument misses the point. First, as discussed further below, Petitioners had access to the prior motion regarding Rule 8 violations, and the court had no obligation to warn the Petitioners about the relevant case law related to Rule 8. Second, the court's order of February 7, 1991, allowed Petitioners 10 days to amend the First Amended Complaint and informed them that the amended pleading could not exceed 15 pages. In response, the Petitioners chose to do nothing. Petitioners' claim of lack of notice is frivolous.

3. Propriety of Dismissal Under Rule 41(b)

While the remedy of dismissal with prejudice for failure to follow a court's rule or order is harsh, such an action by the court is appropriate in aggravated circumstances, as occurred at the trial level in this case. Von Poppenheim v. Portland Boxing Comm., 442 F.2d 1047 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972), reh.

denied, 405 U.S. 999 (1972). All that is required of the judge is that possible and meaningful alternatives be reasonably explored. Id. See also, Nevijel, 651 F.2d at 674. Although sanctions short of a dismissal under Rule 41(b) are available in the event of a parties' failure to comply with the trial judge's order, the judge need not exhaust them before dismissing the case. Id.

This Writ for Certiorari is premised in part on an assertion that the Petitioners were taken by surprise and not properly forewarned that the court's patience with their abuses might eventually run out. Contained in the Statement of the Case are the many instances in which the district court gave Petitioners and their counsel opportunities to produce proper pleadings. No authority is available which would support the proposition that the district court was required to provide warning of matters that are clearly embraced by the concept of common sense. Petitioners were given an opportunity to amend their Complaint to comply with the court's order and chose not to do so. Neither naivete nor unfair surprise are credible excuses for the form in which this suit was filed and the way in which it was subsequently managed.

The court was completely justified in dismissing this claim with prejudice under the circumstances. An ample body of law, clearly applicable to these pleadings, and to the possibility of dismissal with prejudice for failure to correct such pleadings, was brought to the attention of the Petitioners early in this case, and was reasserted throughout the district court proceedings.

4. Petitioners' Arguments of the Need for Expanded Pleadings for the Younger Claims, Racketeering Claims, and Civil Rights Claims Do Not Apply to Respondent Beren.

Petitioners argue that the length of their pleadings was justified because of the heavy pleading requirements of Younger Claims, Racketeering Claims and Civil Rights Claims. This argument does not apply to Respondent Beren because it was clear before the original Complaint was filed that it was impossible to state a proper claim against this Respondent. The only purpose of

the litigation against Respondent Beren was to harass.

The frivolous racketeering claims against Respondent Beren arise from his testimony as a witness before the Pima County Grand Jury. Respondent has absolute immunity against any claims for damages arising out of his testimony in a judicial proceeding. Western Technologies v. Sverdrup & Parcel, 154 Ariz. 1, 4, 739 P.2d 1318 (App. 1987); Green Acres Trust v. London, 141 Ariz. 609, 612-613, 688 P.2d 617 (1984); Prosser and Keeton, Law of Torts, §114 at page 817 (5th Ed. 1984).

The federal racketeering claim also fails because it does not show a pattern of racketeering activity. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. H.J. Inc. v. Northwestern Bell Telephone Company, 109 S. Ct. 2893 (1989); Pitts v. Turner and Boisseau Chartered, 850 F.2d 650 (10th Cir. 1988). In addition, there is no allegation that Respondent Beren is involved in an enterprise. He is simply an individual who followed court orders to testify. He certainly did not engage in his testimony for profit. There is nothing in the First Amended Complaint that would support a cause of action against Respondent Beren for racketeering.

The civil rights claims made against Respondent Beren are equally groundless. These claims also fail because Respondent is immune from any civil liability as a result of his participation in judicial proceedings. Burns v. County of King, 883 F.2d 819 (9th Cir. 1989); Holt v. Castaneda, 832 F.2d 123 (9th Cir. 1987), cert. denied, 485 U.S. 979 (1988), Burke v. Miller, 580 F.2d 108 (4th Cir. 1978); Daloia v. Rose, 849 F.2d 74 (2nd Cir. 1988), cert. denied, 488 U.S. 898 (1988). Witnesses are absolutely immune in a civil suit for damages for false and/or malicious statements made while testifying before a grand jury, or in trial, as long as the testimony was related to the subject matter of the inquiry. Lofland v. Meyers, 442 F.Supp. 955 (S.D.N.Y. 1977). The immunity granted witnesses under §§1983 and 1985 also extends to civil liability under Bivens theories. See, O'Connor v. State of Nevada, 507 F.Supp. 546 (D.Nev. 1981), aff'd, O'Connor v. Nevada, 686 F.2d 749 (9th Cir. 1982).

Petitioners might claim Respondent Beren's testimony was an invasion of privacy. Such a claim would be unavailing since immunity also extends to an action for invasion of privacy because of an alleged violation of the attorney-client privilege. Prosser and Keeton, Law of Torts, §117 at 868 (5th Ed. 1984). The fact the testimony of Respondent Beren was compelled by court order provides additional protection to Respondent Beren from later civil liability. McCormick on Evidence, §93 at 223 (3rd Ed. 1984); ABA Code of Responsibility, Disciplinary Rule 4-101(c): "A lawyer may reveal confidences or secrets when . . . required by law or court order."

The only testimony that Petitioners really objected to was Beren's admission that he did not work for Mr. Jenkins individually. Testimony identifying a client is not within the attorney client privilege. McCormick on Evidence, §90 at 215 (3rd Ed. 1984). There was also no privilege since the testimony was in regard to a future crime-fraud. Such testimony is also not protected by the attorney client privilege. McCormick on Evidence, §90 at 229 (3rd Ed. 1984).

The argument that Petitioners needed to allege additional facts to state a cause of action is simply untrue. Despite 11 inches of pleadings they were still unable to state a cause of action against this Respondent. Instead, the only purpose of the burdensome pleadings was to confuse matters sufficiently so that the lack of substance of the allegations would go unnoticed. This is precisely the evil Rule 8 was designed to prevent. The argument that dismissal was improper because of the additional pleading requirements of Younger claims, racketeering claims, and civil rights claims is groundless.

5. Violation of Rule 21

Petitioners' violation of Rule 21, F.R.C.P., was but one in a series of rule violations. The tactic was yet another reason why the court was justified in dismissing this case with prejudice for failure

to follow the rules.

IV.

The district court had jurisdiction to dismiss Petitioners' lawsuit pursuant to Fed. R. Civ. P. Rules 8(a), 8(e), 21 and 41(b).

A. Irrelevancy of Younger on Appeal

The Petitioners' argument that the district court lacked jurisdiction to dismiss this suit is—at first glance—confusing, and—after scrutiny—frivolous. The Petitioners have conjured up the notion that the federal court, faced with an argument of an exception to the Younger abstention doctrine, can only exercise jurisdiction if it rules in their favor. By this reasoning, the district court has no jurisdiction over Petitioners' cause of action because jurisdiction sufficient to dismiss the action is only conferred upon the district court after it has made a finding of bad faith or harassment in the state court criminal prosecution. Petitioners assert that the district court has no jurisdiction until such time as it determines that intervention is appropriate, and that therefore the court's sanction of dismissal prior to such intervention is void ab initio due to the total want of jurisdiction. Petitioners' argument is illogical, incorrect, and in conflict with the legal concepts embodied in the term jurisdiction.

The legal concept of a court's jurisdiction deals with the basic power and authority to act at all, rather than the manner in which a court should act if it has such power. "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress..." Neirbo Co. v. Bethlehem Shipbuilding Corporation, 308 U.S. 165, 167 (1939). "When concerned .. with the power of the . . . federal courts to entertain litigation .. `jurisdiction' means the kinds of issues which give right of entrance to federal courts." Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 671 (1950). In the case at bar, the district court was given jurisdiction over the Petitioners' Complaint pursuant to federal question and civil rights statutes based upon the alleged claims

under 42 U.S.C. §1983 and 18 U.S.C. §1964. Indeed, the petitioner invoked the jurisdiction of the district court when he filed his Complaint.

This Court held "If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249 (1951). The district court was given the jurisdiction to adjudicate this matter by Congress, and this grant of jurisdiction was not dependent upon any subsequent determination by the court, e.g., a perceived authority to intervene Younger v. Harris, supra. "The jurisdiction of the court can never depend upon its decision upon the merits of the cause brought before it, but upon its right to hear and decide it at all." Ex parte Watkins, 32 U.S. 568, 572 (1833).

Before the Petitioners would have been entitled to obtain the relief requested, it would have been necessary to first prevail on the issue of whether an exception to the Younger abstention doctrine was present. This necessity would permit the federal court to proceed and adjudicate the Petitioners' claims, which admittedly involve issues over which the district court has subject matter jurisdiction. The Younger abstention doctrine itself, however, is not a jurisdictional matter. Hydrostorage v. Northern Cal. Boilermakers, 891 F.2d 719 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990); Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir. 1984).

This conclusion is also mandated by the Supreme Court's determination in Sosna v. Iowa, 419 U.S. 393 (1975). In Sosna, this Court indicated that it had requested that the parties address themselves to the issue of whether Younger v. Harris should affect whether or not the district court or the Supreme Court should reach the merits of the constitutional issue, and, after being urged by the parties to reach the merits, the Court decided to rule upon the constitutional issue presented. Sosna v. Iowa, 419 U.S. at 397 n 3. Because it is well settled that "mere agreement of the parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case", People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880), it is apparent the Younger abstention is not jurisdictional,

and any failure to abstain pursuant to Younger would not result in any extrajurisdictional act by the district court. Petitioners' arguments, asserting the judgment of dismissal of the district court is void ab initio for lack of jurisdiction, are baseless and wrong.

Deakins v. Monaghan, 484 U.S. 193 (1988), contains nothing whatsoever which would reflect upon any supposed lack of jurisdiction of the district court to decide the Petitioners' case. Deakins is inapposite in that it dealt with Younger abstention issues, and it had nothing to do with the propriety of sanctioning litigants who violate the Federal Rules of Civil Procedure. The district court neither abstained nor proceeded in the case at bar. The issues in this case no longer include Younger abstention issues. This is a Rule 41(b) sanctions case. Since Deakins dealt with the federal court's duty to retain jurisdiction when claims are properly before it, it is hard to imagine what relevance such a case would have to litigants, such as the Petitioners, who have been thrown out of the federal court because of egregiously improper conduct and defiance of the court's own rules. If there is any legal authority for the unlikely proposition asserted by the Petitioners that Rule 41(b), Fed. F. Civ. P. does not apply to this case, none has been provided.

Although the foregoing indicates that the district court had the jurisdiction to determine the Petitioners' case, it is not apparent that the district court's jurisdiction over the subject matter of the Petitioner's cause of action was even a necessary prerequisite to impose the court's sanction of dismissal pursuant to Rule 41(b). This is true because the Petitioners have failed to follow the Federal Rules of Civil Procedure. At least in the Rule 11 context, "[t]he fact that the district court lacked jurisdiction to consider the merits of the case did not preclude it from imposing sanctions." Orange Production Credit v. Frontline Ventures, Ltd., 792 F.2d 797 (9th Cir. 1986).

Since the Petitioners placed themselves before the district court, they should reasonably be expected to follow the rules of the tribunal which they themselves invoked, and they should not now be heard to assert that such tribunal has no authority to act in a manner which negatively impacts upon theme.

B. The Doctrine of Judicial Estoppel

The Petitioners should be estopped from claiming that the district court lacked jurisdiction in this case by the common law principle of judicial estoppel. The Petitioners invoked the jurisdiction of the court at the outset of this action and have repeatedly urged in the court below that the Younger abstention doctrine should not apply, and that the court should assert jurisdiction. They now argue that the court should never have asserted jurisdiction.

These inconsistent arguments are barred by the doctrine of equitable estoppel. This doctrine applies to arguments made at the district court level which are contradicted on appeal. The doctrine is intended to prevent litigants from playing "fast and loose with the court" by asserting inconsistent positions. Rockwell International Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988). The doctrine is intended to foster "the orderly administration of justice and ... the dignity of judicial proceedings. State of Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984), cert. denied, 469 U.S. 1197 (1985). The doctrine is to be applied to prevent the perversion of the judicial process by discouraging intentional self-contradiction which has been used as a means of obtaining unfair advantage in a forum whose interest is justice. Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990), cert. denied, 111 S. Ct. 48 (1990).

The Petitioners have invoked, asserted, and argued the jurisdiction of the district court over their claim. Having done so, the Petitioners should be precluded from taking the inconsistent legal position which they have taken upon appeal. It would not be appropriate to permit the Petitioners to use self-contradiction to avoid the consequences of their improper acts, nor to permit further abuse of the Court or the Respondents at the hand of these Petitioners.

This case is ideally suited for the application of judicial estoppel. Petitioners' sudden change in position should not be permitted, and in the context of this case, the tactic should be

sanctioned.

III.
Sanctions and fees on appeal.

Neither Petitioners nor their counsel can reasonably assert in good faith that the mass of repetitive paper which they deposited in the federal court was consistent with Rule 8. The Ninth Circuit Court of Appeals had ample reason to sanction the conduct of the Petitioners and their counsel in this case. Because this case was brought primarily as a §1983 action and is not only frivolous but brought for improper purposes, motions for fees and sanctions pursuant to Rule 11 and 42 U.S.C. §1988 are presently pending before the district court.

Petitioners' invocation of the Younger line of cases as an attack in this Court on the district court's jurisdiction is spurious. Younger and its progeny dealt with federal court interference in state court proceedings by way of injunction. Under Petitioners' logic, a federal court would never have jurisdiction, unless it was prepared to make a ruling that the Younger abstention does not apply. This line of thinking would put the Petitioners in a "win-win" situation. The district court would be required to either intervene in the criminal proceeding or dismiss for want of jurisdiction. The court would thereby be divested of power to make a decision on the merits, and would, in effect, be forced to leave the Petitioners free to deposit the same pleadings in state court. The application of Younger urged by Petitioners is not only illogical, but would amount to inviting every state court criminal defendant to seek federal intervention in his or her state court prosecution. Petitioners and their counsel expose, by the argument related to Younger, a desire to control the decision-making process of the district court in a highly inappropriate manner. Petitioners wish to "corner" the district court, forcing it to either accept jurisdiction and decide in their favor, or to not exercise jurisdiction.

Petitioners' argument is not a surprise, in light of the fact that the allegations of the federal civil complaint are based in large part on Petitioners not getting their way before a variety of judges. As

judges and officials did not do what Petitioners wished, they were spun into a cobweb of alleged conspiracy. Petitioners' counsel cooperated in this approach to the judicial system.

Because none of the issues raised on appeal had merit, the appeal was properly sanctioned under Rule 38, Fed. R. App. P. Under Rule 38, the court of appeals may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." McCarthy v. Mayo, 827 F.2d 1310, 1318 (9th Cir. 1987). The decision of the Ninth Circuit Court of Appeals to sanction the Petitioners was proper.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

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(3)

No. 92-441

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,
Petitioners,

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Counsel of Record
October 14, 1992

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PETITIONERS' REPLY MEMORANDUM

In urging the Court to deny Petitioners' request for a writ of certiorari, the Pima County Respondents[1] and Respondent Beren raise several issues, all of which, Petitioners demonstrate, are without merit. Petitioners demonstrate herein that the Petition for Writ of Certiorari was timely filed and the issues raised by Petitioners in their Petition are worthy of the Court's consideration.

I. THE PETITION WAS TIMELY FILED.

By raising the issue that the Petition was untimely filed, the Pima County Respondents and Respondent Beren have taken exception to Petitioners' premise that the Court's jurisdiction is predicated upon the Ninth Circuit's final June 12, 1992 Order. See *JURISDICTION* section, Petition for Writ of Certiorari, pp. 2-4. In support of their arguments that the Court's jurisdiction should be predicated upon the Ninth Circuit's April 27, 1992 Order, the objecting Respondents suggest that the Ninth Circuit's June 12, 1992 Order did not disturb or revise legal rights and obligations which, by either the Ninth Circuit's March 2, 1992 Memorandum Decision or April 27, 1992 Order denying rehearing *en banc*, had been plainly and properly settled with finality. The objecting Respondents raise the issue that the instant Petition for Writ of Certiorari was filed out of time on September 1, 1992 and, as a result, the Court lacks jurisdiction to consider the merits of the Petition. In essence, the objecting Respondents argue that the Ninth Circuit's June 12, 1992 Order would not extend the time for applying for a writ of certiorari for the reason that it did not change any matters of substance. These arguments are in error.

On August 5, 1991, the Pima County Respondents and Respondents Beren and Boice filed their brief in opposition in the appeal to the Ninth Circuit and sought the affirmation of the District Court's final judgment of dismissal with prejudice and sanctions against the Petitioners for costs and attorney's fees for having filed a frivolous appeal.[2] On March 2, 1992, the Ninth

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[1] "Pima County Respondents" refers to Respondents Alan D. Davidon, Millard Rowlette, Stephen D. Neely, Jerry Goddard, Pima County, a body politic and corporate, Greg Lunn, Dan Eckstrom, Ed Moore, Reg Morrison, Raul Grijalva.

[2] See Exhibit B of Petitioners' October 5, 1992 *"APPLICATION TO STAY FINAL JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE*

Circuit issued its Memorandum Decision holding (i) that the District Court had subject matter jurisdiction, (ii) that this Court's *Younger*[3] mandate did not bar the District Court's dismissal with prejudice even though the District Court assumed jurisdiction to interfere in state criminal proceedings without first finding that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners or for other exceptional circumstances, and (iii) that Petitioners' appeal was frivolous and awarded sanctions of only double costs against the Petitioners, although the Respondents had requested both costs and attorney's fees.

On May 11, 1992, the Pima County Respondents renewed their request for an award of attorney's fees on appeal solely based on the Ninth Circuit's March 2, 1992 determination that the appeal was frivolous.[4] On May 26, 1992, Petitioners filed their opposition to the renewed request for attorney's fees for the reason, among others, that the Ninth Circuit had already sanctioned Petitioners and nothing had occurred to merit further sanctions. Further, Petitioners provided the Ninth Circuit with an academic reference describing this Court's *Younger* mandate as analogous to a federal subject matter jurisdiction statute in support of the rationale for their appeal.[5] On June 12, 1992, the Ninth Circuit increased the award of sanctions against the Petitioners for having filed a frivolous appeal to include attorney's fees on appeal, thereby altering the sanctions imposed by its March 2, 1992 Memorandum Decision.

When the demand for attorney's fees itself is part of the merits, finality does not exist until the attorney's fees question is determined. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S.

DISTRICT OF ARIZONA," an excerpt from the Brief of Appellees before the Ninth Circuit, which is incorporated herein by this reference.

[3] Younger v. Harris, 401 U.S. 37 (1971).

[4] Although the Pima County Respondents' May 11, 1992 request for attorney's fees was, in substance, a motion to reconsider an award of attorney's fees, the motion was treated as timely filed by the Ninth Circuit in apparent reliance on the April 27, 1992 Order date.

[5] See Exhibit E of Petitioners' October 5, 1992 "*APPLICATION TO STAY FINAL JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA*," Petitioners' May 26, 1992 opposition to the Respondents' second request for attorney's fees, which is incorporated herein by this reference.

730, 740-742 (1976). The facts in *Liberty Mutual* are analogous to the facts in the case at bar.

The Respondents (i) had sought an award of attorney's fees in their August 5, 1991 opening brief in the appeal before the Ninth Circuit as an integral part of their merits recovery, (ii) were initially awarded only double costs by the Ninth Circuit in its March 2, 1992 Memorandum Decision, (iii) subsequently again moved for an award of attorney's fees on May 11, 1992 as a further sanction for the same conduct and (iv) were finally awarded that requested relief by the Ninth Circuit on June 12, 1992. The very injury the Respondents sought to remedy was the injury incurred by being forced to file a brief in opposition, in an appeal they believed to be frivolous. As a result, their initial request for attorney's fees included in their brief in opposition was part and parcel of the remedy they sought for the injury they believed they had incurred, and was not collateral to the remedy sought.

In *Liberty Mutual*, this Court held that since the merits recovery specifically prayed for an award of attorney's fees to redress the claim for relief pleaded therein, the adjudication by the District Court for appeal purposes under 28 U.S.C. §1291 was not final until the claim for attorney's fees was determined. *Liberty Mutual, supra*. In this case, once the Respondents filed their May 11, 1992 motion for attorney's fees, which renewed their request for that relief, the time for Petitioners to file their Petition for Writ of Certiorari was tolled until the Ninth Circuit determined that motion. That determination could, and did, materially amend Petitioners' legal liability engendered by the March 2, 1992 Memorandum Decision. Indeed, the basis for the sanction was inextricably intertwined with the decision on the merits. As a result, the adjudication by the Ninth Circuit was not final, in a *Liberty Mutual* context, until June 12, 1992.

Respondent Beren also relies on this Court's decision in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) in arguing that the Petition is untimely. Respondent Beren argues that *Minneapolis-Honeywell* suggests that a substantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for seeking review of the unchanged portion. That analysis mischaracterizes *Minneapolis-Honeywell*.

As indicated in *Minneapolis-Honeywell*, the test is a practical one. The question is whether the lower court, in its second order,

has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. *Id*, at 212. Since the Respondents had prayed for sanctions including costs and attorney's fees in their opening brief, the Ninth Circuit's March 2, 1992 Memorandum Decision created the appearance of finality. It awarded sanctions and led Petitioners to believe the extent of the sanction, limited to double costs, reflected the Ninth Circuit's assessment of the extent of the frivolity. What the Ninth Circuit awarded as sanctions was completely within its discretion. Rule 38, Fed.R.App.P., 28 U.S.C. As a result, when the Respondents moved again for an award of attorney's fees on May 11, 1992 they were requesting the Ninth Circuit to revisit an issue that had been determined with finality on March 2, 1992. When the Ninth Circuit determined the award of attorney's fees on June 12, 1992, it altered the legal liability incurred by these Petitioners for having filed a frivolous appeal since the basis for the additional sanction was the same as for the original sanction. Thus, in *Minneapolis-Honeywell* terms, the second order changed the legal liability imposed by the first order. As a result, the time for filing the Petition for Writ of Certiorari in the instant case is properly determined on the basis of the June 12, 1992 Order and the Ninth Circuit's first order, the March 2, 1992 Memorandum Decision, is subsumed therein for purposes of review by this Court.

The Ninth Circuit's final action in this case occurred on June 12, 1992. Therefore, the 90 day period prescribed in 28 U.S.C. §2101(c) for filing a petition for writ of certiorari in this Court is determined by reference to the June 12, 1992 Order. Based on the foregoing, this Court has jurisdiction to review the Ninth Circuit's memorandum decision and orders denying rehearing *en banc* and awarding of attorney's fees on appeal against the Petitioners pursuant to Section 1254(1) of Title 28, United States Code.

II. COMPELLING THE LOWER COURTS TO FOLLOW THIS COURT'S DECISIONS IS A SUFFICIENT REASON FOR GRANTING CERTIORARI.

Respondent Beren raised the question that the issues presented in the Petition do not warrant review. The issues raised in the Petition suggest that the lower Courts refused to follow this Court's decisions in *Younger* and *Deakins v. Monaghan*, 484 U.S. 193 (1988). The refusal of the lower Courts to follow this Court's

Younger and *Deakins* mandates is sufficient grounds for immediate relief from this Court. *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314 (1983) (Powell, J.). The Petition indicates the Ninth Circuit did not follow its own decisions. See Petition for Writ of Certiorari, at p. 18. Accordingly, the issue is certworthy.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE.

Both the Pima County Respondents and Respondent Beren indicate that the District Court's dismissal with prejudice was predicated upon Rules 8(a), 8(e), 21 and 41(b), Fed.R.Civ.P., 28 U.S.C. This assertion, in part, is in error. The District Court's February 7, 1991 Order clearly indicates that Rules 8(a), 8(e) and 41(b) govern its decision to dismiss with prejudice. See Petition for Writ of Certiorari, at p. A-12. Therefore, no violation of Rule 21 served as a basis for the District Court's dismissal with prejudice.[6]

The District Court, by its February 7, 1991 Order, did grant Petitioners leave to file a further amended complaint within ten days limited to fifteen (15) pages. Petitioners pleaded the unreasonable nature of this limitation in their motion for reconsideration for the reason that the complaint named over forty (40) defendants and fifty (50) claims for relief. Petitioners also requested the District Court explain how they were to meet their heavy pleading burden. Rather than adjust its prior command, the District Court entered a final judgment of dismissal with prejudice.

The District Court abused its discretion in dismissing the amended complaint with prejudice for the foregoing reasons and the reasons cited in the Petition and for another insidious purpose.

The record in the proceedings below circumstantially indicate that the District Court Judge improperly employed Rule 8 to preclude the Petitioners from proving, in an evidentiary hearing,

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[6] By the District Court's September 7, 1990 Order granting leave to amend, which that Order was unqualified, Petitioners believed that they could amend their original complaint in any manner whatsoever, including naming additional parties. There could be no prejudice to the additional parties since there was no expiration of any limitation of action time period. As a result, Petitioners could have achieved the same effect by merely filing a separate complaint.

an $80 million automatic stay violation and numerous acts of bankruptcy fraud occurring with the knowledge of the Bankruptcy Court Judge involved. District Court case number CIV-90-315-TUC-WDB involved an appeal from the Bankruptcy Court's affirmation of a settlement agreement between Admiral Insurance Company[7] and a majority of the JNC Investors. During the pendency of that appeal, the District Court,[8] on or about October 1, 1990, in several related cases involving disputes between Admiral and certain JNC Investors, entered an order that made a factual finding that Admiral was the legal owner of certain JNC-related investor notes receivable. On October 31, 1990, Jenkins and JNC then filed their "Third Motion To Take Judicial Notice Of Other Adjudicative Facts; Motion To Remand For Evidentiary Hearing To Determine Violation Of Automatic Stay" in the matter of CIV-90-315-TUC-WDB.

That motion pleaded that Admiral had committed a fraud on the District Court by inducing the District Judge into making a finding of fact that Admiral was the legal owner of approximately $80 million of notes receivable that are the property of the JNC-related bankruptcy estates. In support of that claim, Petitioners Jenkins and JNC requested the District Court to take judicial notice of affidavits filed by Admiral in the Bankruptcy Court that alleged the notes were collaterally assigned to the Note Lenders as compared to affidavits filed by Admiral in the Admiral-JNC Investor litigation that claimed that Admiral owned the notes receivable. The fact that the notes receivable had been collaterally assigned was found by the Ninth Circuit, to wit:

> ". . . JNC then borrowed money from various lenders and assigned the investor notes to the lenders as collateral."
>
> *Admiral Insurance Company v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1488 (9th Cir. 1989).

The docket for CIV-90-315-TUC-WDB reveals that the bankruptcy files were returned to the District Judge's chambers on

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[7] Admiral Insurance Company is represented by Respondents Susan G. Boswell and Streich Lang, P.A. in the JNC-related Bankruptcy Court litigation.

[8] The District Judge was the same District Judge in the proceedings below.

November 6, 1990, immediately after the foregoing motion to take judicial notice had been filed. Thereafter, the District Court denied the foregoing motion to take judicial notice.[9]

The rulings of the District Court precluded an evidentiary hearing in which the evidence would have revealed the foundation of a scheme to employ the criminal process of the State of Arizona to oppress Jenkins and JNC. The oppressive criminal proceedings were not undertaken for the purpose of obtaining valid convictions. Indeed, the State has already dismissed JNC with prejudice. Rather, the criminal proceedings were undertaken to thwart Petitioners' abilities to prove their claims in the District Court and Bankruptcy litigation that Admiral violated the Bankruptcy Code's automatic stay provisions by usurping ownership of $80 million of bankruptcy estate assets.[10] These assets were the notes receivable from the JNC Investors. Admiral and Respondent Boice, among others, participated in numerous acts of bankruptcy fraud, by retaining false claims of liability against the JNC-related bankruptcy estates to defeat the provisions of Title 11, in violation of 18 U.S.C. §152.[11] These acts were undertaken to afford the

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[9] The documentation evidencing the foregoing were part of the new exhibits submitted in support of Petitioners' December 21, 1990 first amended complaint in the proceedings before the District Court.

[10] Admiral violated the automatic stay so as not to cause a "transfer" within the meaning of 26 U.S.C. §108(e)(5). Admiral insured the JNC Investors' obligations under the Investor Notes to the Note Lenders. Upon paying claims to the Note Lenders, Admiral usurped possession of the Investor Notes from the Note Lenders without an Orde. from the Bankruptcy Court. Thereafter, had Admiral first moved to lift the automatic stay, foreclosed on the JNC Partnerships' ownership interests in the Investor Notes and then sued the JNC Investors for collection thereon, when Admiral cancelled the JNC Investors' indebtedness the JNC Investors could not avail themselves to the relief provisions of 26 U.S.C. §108(e)(5) to avoid recognizing debt relief income. See the Senate Conference Report from the Bankruptcy Tax Act of 1980 at S.Rept.No. 96-1035 (P.L. 96-589) pp. 16-17.

[11] Admiral, among others, retained false claims of liability against the JNC-related limited partnership bankruptcy estates to forestall a decrease in the JNC Investors' tax basis of their limited partnership interests. Admiral paid claims to certain Note Lenders pursuant to the terms of certain financial guaranty bonds, which such payments indirectly extinguished loans owing by the JNC Partnerships. That occurred in 1987 and 1988. As a result of those payments, the JNC Partnerships' liabilities should have been reduced, thereby reducing the tax basis of the JNC Investors to zero and triggering recapture income pursuant to 26

JNC Investors a tax-free release of their obligations to pay the JNC bankruptcy estates $80 million.[12]

On September 7, 1990, the District Court, in the proceedings below, granted Petitioners' motion to take judicial notice of many pleadings in the state criminal proceedings. On November 15, 1990, after the District Judge was made well aware of conflicting affidavits submitted by Admiral regarding ownership of the JNC Investor Notes, the District Court vacated its September 7, 1990 Order granting the Petitioners' motion below to take judicial notice.

Thereafter, the District Court dismissed the CIV-90-305-TUC-WDB first amended complaint with prejudice, pursuant to Rules 8(a), 8(e) and 41(b), Fed.R.Civ.P., 28 U.S.C., for being too long. Apprised of the foregoing facts and circumstances, a reasonable person could conclude that the District Court knowingly and intentionally ignored this Court's *Younger* mandate and invoked Rule 8 to preclude any evidentiary hearing that would reveal Admiral's automatic stay violation and the acts of bankruptcy

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U.S.C. §§1245 and/or 1250. In November 1989, Admiral entered into a settlement agreement with the JNC Investors, indemnifying the JNC Investors against collection on the $80 million of notes receivable. The JNC Investors intended to invoke the purchase price reduction exclusionary relief of 26 U.S.C. §108(e)(5) to avoid recognizing debt relief income, but could not benefit from that provision if their tax basis was zero. As a result, Admiral and Respondent Boice, among others, retained false claims of liability against the bankruptcy estates of the JNC Partnerships to retain a false tax basis, thereby evading recapture income in 1987 and 1988 and evading debt relief income in 1989 by providing a false tax basis for 26 U.S.C. §108(e)(5) exclusionary relief.

Admiral was proscribed by the Uniform Insurance Code from having any interest in any Partnership Note. A.R.S. §20-1547. Since Admiral was a beneficiary under trust deeds secured by the JNC Partnerships' real properties, coupled with the fact that Admiral transacted other lines of insurance business, it was precluded by the monoline mortgage guaranty insurance statute from having any interest in a Partnership Note. In Arizona, A.R.S. §20-1547 proscribes an insurance company from transacting mortgage guaranty insurance if that company transacts insurance business in other lines of insurance. In Arizona, mortgage guaranty insurance involves the insurance of a note that is secured by a security interest in real property. See A.R.S. §20-1541(3). As a result of the foregoing, Admiral was proscribed by Arizona law from having any interest in the Partnership Notes, including any subrogation right to the Note Lenders' interests in the JNC Partnerships' Notes.

[12] See the Arizona Court of Appeals' decision in JNC Companies v. Meehan, which is included in the Petition for Writ of Certiorari at p. C-1.

fraud. The District Court had an interest in preserving the propriety of its factual finding that Admiral was the legal owner of the notes receivable and preserving numerous dismissals of the Admiral-JNC Investor suits. The truth is, that the Bankruptcy Judge failed to stop a glaring automatic stay violation and knowingly tolerated numerous acts of bankruptcy fraud to further the pecuniary interests of favored parties appearing before him.[13] The District Court's affirmation of the conduct of the Bankruptcy Judge amounts to a cover-up of judicial malfeasance, under color of law, and is designed to thwart the Petitioners' efforts to reorganize.

Based on the foregoing and the arguments in the Petition for Writ of Certiorari at pp. 20-27, and in view of the procedural history of this case, it is unequivocal that the District Court abused its discretion in dismissing the first amended complaint with prejudice pursuant to Rules 8(a), 8(e) and 41(b), Fed.R.Civ.P., 28 U.S.C.

IV. *YOUNGER* BARRED THE EXERCISE OF THE DISTRICT COURT'S JURISDICTION.

The Petition briefs Petitioners' position that *Younger* barred the exercise of the District Court's jurisdiction over the amended complaint's equitable claims and that *Deakins* barred the District Court's exercise of jurisdiction over the amended complaint's money damage claims. See Petition for Writ of Certiorari, at pp. 14-20. Nothing contained in either the Pima County Respondents' brief in opposition or Respondent Beren's brief in opposition affects the *Younger* and *Deakins* bar to the exercise of jurisdiction.

The Pima County Respondents argue that the Court's decision

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[13] Petitioner Jenkins filed a complaint for judicial misconduct against the Bankruptcy Judge in the Judicial Council for the Ninth Circuit for usurping jurisdiction not otherwise granted to him by Congress when it enacted the Bankruptcy Code and specifically barred by this Court in *Younger* when he authorized the trustee in bankruptcy to plea bargain JNC to a felony conviction in the state criminal proceedings over the objection of Jenkins and JNC. Petitioner Jenkins alleged the Bankruptcy Judge attempted to insure JNC's conviction to cover-up Admiral's automatic stay violation and the numerous acts of bankruptcy fraud occurring in the Bankruptcy Court. The Judicial Council held that the complaint failed to state a claim against the Bankruptcy Judge since he acted in his judicial capacity.

in *Sosna v. Iowa*, 419 U.S. 393 (1975), supports their position that *Younger* is not a bar in the instant case. The Court exercised its jurisdiction in *Sosna* because the parties did not raise *Younger* as a bar. In the instant case, both the Pima County Respondents and Respondent Beren, in pleadings filed in the District Court below, raised *Younger* as a bar to the exercise of the District Court's jurisdiction. As a result, *Sosna* is inapposite in the instant case.

Nonetheless, the Federalism and comity interests identified in *Younger* are neither the interests of the Pima County Respondents nor Respondent Beren. They are the interests of the State of Arizona, a non-party. Although some of the Pima County Respondents represent the State of Arizona in the ongoing criminal proceedings, they are barred by the Rules of the Arizona Supreme Court from waiving that interest for the reason that they have a conflict of interest and cannot obtain a waiver of that conflict from the State of Arizona. See, ER 1.7(b) and ER 1.13(e), Rule 42, Rules of the Arizona Supreme Court, 17A A.R.S.; *Rice v. Baron*, 456 F.Supp. 1361, 1376 (S.D.N.Y. 1978) [corporate directors accused of breaching fiduciary obligations cannot consent on behalf of the corporation to dual representation of the corporation and directors]. Accordingly, the *Younger* and *Deakins* bar stands until either these Petitioners make a showing that the criminal proceedings were undertaken in bad faith, to harass them, or for other exceptional circumstances or until the criminal proceedings are resolved.

CONCLUSION

For these substantial reasons, the issues raised in the Petition are worthy of this Court's review, and Petitioners pray that this Court grant their Petition.

Respectfully submitted,

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